No. 93-1050

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CLYDE E.L. MANSFIELD, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Following the successful challenge of a conviction on the basis of ineffective assistance of counsel, does the due process clause of the Fifth Amendment bar the subsequent use of statements prepared by an accused at the request of his ineffective trial defense counsel, which statements were introduced during the evidentiary hearing for the limited purpose of establishing the denial of the Sixth Amendment right to effective counsel.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Clyde E.L. Mansfield, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Military Appeals entered in his case on September 30, 1993.

OPINIONS BELOW

The order and judgment of the United States Court of Military Appeals, No. 67,973, slip op. (C.M.A. 30 September 1993) is located at Appendix A. The opinion of the United States Air Force Court of Military Review setting aside petitioner's conviction following the first trial (*Mansfield I*) is reported at 24 M.J. 611 (A.F.C.M.R. 1987) (Appendix B).

The opinion of the United States Air Force Court of Military Review which affirmed petitioner's conviction following retrial (*Mansfield II*) is reported at 33 M.J. 972 (A.F.C.M.R. 1991) (Appendix C).

JURISDICTION

The final order of the United States Court of Military Appeals was entered on September 30, 1993. The jurisdiction of this Court is invoked under 28 USCA § 1259(3) (Supp. 1992) and 10 USCA § 867(a) (Supp. 1992).

CONSTITUTIONAL PROVISIONS INVOLVED

The fifth Amendment of the Constitution of the United States provides in relevant part:

> No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

The Sixth Amendment of the Constitution of the United States provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

1. The first trial.

Yang Chae-Song was found dead in an alley in Song-Tan, Korea on February 4, 1984. The cause of death was a single stab wound to his back. The petitioner, a Staff Sergeant (E-5) in the United States Air Force, was soon identified as a suspect and was apprehended at Edwards Air Force Base, California, on April 4, 1984. The victim was the ex-husband of Un-Cha

Haney, the petitioner's lover. The facts leading up to and culminating in the death of Yang Chae-Song are detailed in the opinion of the Air Force Court of Military Review, and need not be repeated here. *United States v. Mansfield*, 33 M.J. 972-1010 (A.F.C.M.R. 1991) (Appendix C).[1]

The appellant was ultimately tried and convicted of premeditated murder and received a sentence which included life imprisonment, a dishonorable discharge, reduction to the grade of E-1, and total forfeiture of pay and allowances. On appeal the petitioner argued, *inter alia*, that he had been denied the effective assistance of counsel. The basis for this assertion was the failure of trial counsel to investigate, prepare and present evidence which would properly support the defense of insanity, or diminished capacity so as to reduce the degree of guilt. In order to resolve the issue the Air Force Court of Military Review, at the joint and several request of appellate government and appellate defense counsel, ordered an evidentiary hearing pursuant to *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

The allegation of ineffective assistance of counsel arose from the decision of petitioner's defense counsel team to abandon an insanity defense in mid-trial. The sanity issue had it's genesis in the petitioner's pretrial confinement hearing. Captain Prater, the local Air Force Area Defense Counsel, established an attorney-client relationship and represented the petitioner at the hearing. Captain Prater was one of four military lawyers who were responsible for the petitioner's defense. It was during this hearing that Captain Prater first became aware of the petitioner's bizarre behavior and obsession with Un-Cha Haney. Unfortunately, Captain Prater did not communicate his concerns regarding the petitioner's sanity to his co-counsel.

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[1] The facts set forth *infra* are contained within the opinions of the Air Force Court of Military Review in *Mansfield I* (Appendix B) and *Mansfield II* (Appendix C).

Following the pretrial confinement hearing, petitioner was returned to Korea. Upon his arrival, the petitioner was interviewed by another defense attorney, Major (then Captain) Gregory P. Holder. In order to begin preparing a defense, Major Holder obtained a verbal rendition of the circumstances surrounding the offense from the petitioner. Initially, the petitioner told Major Holder that he could not recall the events surrounding the killing. Around this time Lieutenant Colonel Nowak became a member of the defense team. Lieutentant Colonel Nowak was the Chief Circuit Defense Counsel for the Seventh Circuit, United States Air Force Judiciary.[2]

Since Major Holder and Lieuteant Colonel Nowak did not believe they had obtained the truth, they advised petitioner not to cooperate with the sanity board initially scheduled by the government. As defense counsel continued questioning petitioner they became aware, as had Captain Prater, of petitioner's preoccupations and obsessions. Lieuteant Colonel Nowak and Major Holder then made a defense request for a sanitary board. The defense request was granted and on June 21, 22 and 25, 1984, the petitioner appeared before Lieutenant Colonel (Doctor) Robert L. Vosburg, who served as the sole member of the sanitary board. In Doctor Vosburg's opinion, the petitioner had a diminished capacity to appreciate the criminality of the offense and lacked capacity to conform his conduct to the law as the result of a mental disorder. The disorder Doctor Vosburg diagnosed was post traumatic neurosis, chronic.

Subsequently, at the request of his counsel, petitioner prepared a 58 page handwritten statement. This statement was later referred to as his "Life Story" during the evidentiary hearing and the retrial in *Mansfield II*. Major Holder reduced

[2] At the time of these events, the Air Force Judiciary consisted of seven circuits. The Seventh Circuit consisted of all Air Force installations in the Pacific region.

the handwritten statement to a typed document. This typed document was admitted as Hearing Exhibit 7 at the post-trial evidentiary hearing, and ultimately became Prosecution Exhibit 65 in *Mansfield II*. Both of these documents were created as attorney work product and kept with the case files.

The petitioner's rendition contained a number of incriminating statements. These included his attempt to hire a "hit man" to kill Yang, his purchase of a knife shortly before the homicide and the manner of its use at the scene. The petitioner later informed his counsel that the "Life Story" was false in a number of respects. He informed Major Holder that he had "dreamt" the information about the hit man and the purchasing of a knife. The petitioner eventually provided defense counsel with another version of the events. This version was one defense counsel believed was closest to the truth and excluded the inculpatory information concerning a hit man and the knife. This version was typed by Captain Holder and introduced at the evidentiary hearing as Hearing Exhibit 8.

Major Holder had reservations about the strength of Doctor Vosburg's potential testimony because he felt Doctor Vosburg lacked experience. However, Major Holder did not discuss his concern with Doctor Vosburg because yet another defense attorney, Major Poole, was responsible for preparing the insanity defense. The defense attorneys were aware that a portion of the pretrial investigation would be conducted in California at Edwards Air Force Base.[3] In order to bolster the testimony of Doctor Vosburg, Captain Prater was contacted and requested to locate civilian psychiatrists in the local California area. Captain Prater arranged appointments with Doctors Michael B. Coburn, John Beck, and William T. Vicary, all

[3] A pretrial investigation conducted pursuant to Article 32, Uniform Code of Military Justice, 10 U.S.C. § 832, is comparable in purpose to a civilian grand jury.

of whom subsequently evaluated the petitioner. Captain Prater never discussed the results of these evaluations with the Doctors involved. The three doctors were provided with petitioner's final statement, as set forth in Hearing Exhibit 8.

On 26 July 1984, the portion of the pretrial investigation scheduled to be held at Edwards Air Force Base was conducted. During the course of the hearing, Majors Poole and Holder learned of 37 lay witnesses who described the petitioner as "strange" or "crazy." Although these defense attorneys obtained the names and addresses of the witnesses, they never attempted to interview them, nor did they request Captain Prater interview them.

Subsequent to the hearing at Edwards Air Force Base, Captain Prater received the evaluations of the civilian doctors. Captain Prater learned that Doctor Vicary could support a defense based on partial mental responsibility, but he never communicated this to co-counsel. Captain Prater also received an evaluation from Doctor Beck which stated the petitioner suffered from a mental defect which resulted in his lacking capacity to conform his conduct to the law. Similarly, Doctor Coburn contacted Captain Prater and advised him that he had changed his original opinion and could now support an insanity defense.

Upon a prosecution motion, a second sanity board was ordered by the military judge. The board, consisting of three psychiatrists, rendered an opinion that the petitioner did not have a mental disease or defect. The defense made no attempt to interview any member of this second board until the board president arrived in Korea as a government witness at trial.

Likewise, Doctors Coburn and Vosburg were not interviewed until they arrived in Korea. In fact, Doctor Coburn did not arrive until approximately the same day the prosecution rested its case-in-chief. It was the interview with Doctor Coburn which caused the defense to abandon the insanity

defense. Although the defense had not provided the experts with either of the petitioner's statements, Doctor Coburn's interview notes mentioned the petitioner attempting to hire a "hit man." Doctor Coburn was surprised to find this entry and informed counsel that he had not relied on the "hit man" information in reaching his opinion. Fearing this information would be devastating on cross-examination, the defense counsel abandoned the mental responsibility defense. Not all of the defense team was satisfied with this approach. Lieutenant Colonel Nowak felt that it was overwhelmingly dangerous to abandon the insanity defense in mid-stream, but did not intercede in his supervisory capacity.

2. The evidentiary hearing.

The petitioner was represented by different counsel at the evidentiary hearing ordered by the Air Force Court of Military Review. The issue of the attorney-client privilege was addressed and both the prosecution and defense recognized that, while waiver of the privilege would apply, the evidence adduced could only be used to resolve the ineffective assistance of counsel issue.[4] The military judge ruled that communications between the petitioner and his prior counsel were included in the limited use waiver. The defense position was that waiver was valid solely for the purpose of resolving the ineffective assistance of counsel claim and could not be used for any other purpose.

The counsel who represented Petitioner at the hearing provided, as a result of the military judge's ruling, both the long

[4] The attorney-client privilege in the military is not a common law rule. The President, exercising his power to prescribe procedures and methods of proof in courts-martial, as granted by Article 36, Uniform Code of Military Justice, 10 U.S.C. § 836, adopted Military Rule of Evidence 502. Mil. R. Evid. 502(d)(3) states that there is no privilege "[a]s to a communication *relevant to an issue of breach of duty* by the lawyer to the client or by the client to the lawyer."

version (Hearing Exhibit 7) and the redacted version (Hearing Exhibit 8) of the "Life Story." Defense counsel made it clear, however, that he was objecting to any use of the documents outside of the evidentiary hearing. Doctors Coburn and Vosburg testified during the course of the evidentiary hearing and both were required to review the long version of the "Life Story" as part of their testimony.

Following completion of the evidentiary hearing, the military judge entered findings of fact[5] and the record was forwarded to the Air Force Court of Military Review. That court, relying on this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), held that petitioner had been denied his constitutional right to the effective assistance of counsel as the result of counsel's failure to investigate, prepare, and present the mental condition evidence. Accordingly, the Air Force Court of Military Review set aside the finding of guilty and the sentence.

3. The second trial.

The petitioner was subsequently retried on the charge of premeditated murder (*Mansfield II*). Prior to the retrial, the defense made a motion *in limine* seeking to preclude the use of either version of the appellant's "Life Story." Defense counsel argued that the prosecution could not use any evidence they had obtained or became aware of as the result of the evidentiary hearing. The prosecution opposed the motion, contending that the attorney-client privilege no longer existed. Although different counsel represented the government, it was clear they were well aware of the existence of the statements.[6]

The military judge initially ruled that the government could reinterview the defense experts and review reports and state-

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[5] The findings of fact are attached as Appendix D.

[6] This is not surprising since, at a minimum, portions of the statements appeared in the published decision in *Mansfield I*.

ments of the petitioner which the expert relied upon in arriving at an opinion, but that privileged matters released at the evidentiary hearing still had limited use protection.[7] The military judge later retreated from this ruling and held that the mere review of hearing exhibit 7 by defense expert witnesses waived any protection accorded the exhibit.

The defense opposed this later ruling on several grounds. First, they pointed out that Doctors Coburn and Vosburg were required to review the long version of the "Life Story" during the evidentiary hearing although neither relied upon it in reaching their opinion. Further, in light of the military judge's ruling, the defense felt it necessary to have the other two experts, Doctors Beck and Strefling, review the long version in order to prepare them for possible cross-examination. The defense made it clear that none of the witnesses relied on this long version as a basis for their opinion. The witnesses had already formed their opinions before its existence was revealed to them and it did not change any of their original opinions.

The long version of the Life Story became Prosecution Exhibit 65 at the retrial. The prosecution went through the statement line by line, page by page, during their cross-examination of Doctor Beck. They also used it during cross-examination of Doctors Strefling and Coburn. Over defense objection, Prosecution Exhibit 65 was admitted as substantive evidence. The prosecution relied upon it during closing argument, and it was considered by the court members during deliberations.

On appeal from his second conviction, both the Air Force Court of Military Review and the United States Court of Military Appeals rejected the petitioner's argument that he had

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[7] The military judge relied on Military Rule of Evidence 105. That rule is identical to, and based on, Federal Rule of Evidence 105.

been denied due process by the use of the evidence which had been released for the limited purpose of resolving the ineffective assistance of counsel claim. The courts below held that any attorney-client privilege which existed had been waived.

REASONS FOR GRANTING THE WRIT

No federal court has established a definite rule with regards to the subsequent use of evidence derived during an evidentiary hearing ordered to address a claim of ineffective assistance of counsel. For the reasons set forth *infra*, the petitioner asserts that the Due Process Clause of the Fifth Amendment prohibits the use of such evidence at a retrial following a successful challenge.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court observed that "the right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendant's the 'ample opportunity to meet the case of the prosecution' to which they are entitled.' " *Id.* at 685, citing *Adams v. United States ex rel. McCann*, 317 U.S. 269. A violation of the right to counsel, as defined by the Sixth Amendment, denies an accused the right to a fair trial as guaranteed by the Due Process Clause of the Fifth Amendment. *Strickland, supra*, 466 U.S. at 684, 685. *See also, United States v. Chronic*, 466 U.S. 648, 658 (1984) ("the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial"). The right to counsel applies fully to service members facing trial by courts-martial. *See, e.g.*, Article 38, Uniform Code of Military Justice, 10 U.S.C. § 838; *United States v. Gnibus*, 21 M.J. 1 (C.M.A. 1985); *United States v. Johnson*, 21 M.J. 211 (C.M.A. 1986).

This Court has established a two pronged test to be applied when a court is confronted with allegations of ineffective assistance of counsel.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, supra, 466 U.S. at 687. With limited exceptions, such as the complete denial of counsel, an accused can establish a claim of ineffective assistance "only by pointing to specific errors made by trial counsel." *United States v. Chronic, supra,* 466 U.S. at 666. An analysis of errors cannot focus solely on outcome determination "without attention to whether the result of the proceeding was fundamentally unfair or unreliable." *Lockhart v. Fretwell,* 113 S.Ct. 838 (1993).

What this Court has not yet addressed, however, is the use of the "specific error" evidence in a subsequent retrial should the accused prevail on the claim that he was denied a fair trial. As the record of the evidentiary hearing reveals, the military judge permitted inquiry into all aspects of the attorney/client relationship during the evidentiary hearing. As a result, considerably more information came to the attention of the prosecution than would have otherwise. The prosecution, over strenuous defense objection, relied heavily on this evidence to not only rebut the mental capacity issue, but to also establish premeditation. Since this evidence consisted of the very thought processes of the petitioner, created in private at the behest of his own attorney in preparation for litigation, its persuasive

value was immense. The result was comparable to the "sacrifice of unarmed prisoners to gladiators." *United States v. Chronic, supra,* 466 U.S. at 657, citing *United States ex rel. Williams v. Twomey,* 510 F.2d 634, 640 (7th Cir. 1975), *cert. denied sub nom. Sielaff v. Williams,* 423 U.S. 876 (1975).

The government's position, and the one adopted by the Air Force Court of Military Review, was that the evidence could be properly used against the appellant because he had waived any attorney-client privilege. The petitioner argued that the government should be barred from using the evidence derived from an evidentiary hearing ordered by the court to address an allegation of ineffective assistance of counsel. The Air Force Court of Military Review rejected petitioner's argument, stating:

> The appellant, however, seeks dismissal of the charges as his remedy. Citing *Kastigar v. United States,* 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), he argues that he was "compelled" to waive the attorney-client privilege in order to establish grounds of ineffective assistance of counsel. Thus, he is entitled to a "*Kastigar*-like" remedy wherein the prosecution has the affirmative duty to prove that the evidence it wishes to use at the second trial was derived from a legitimate source wholly independent of the "compelled" testimony relating to his claim of inadequate representation. He contends, without the protection, ". . . [a] retrial becomes nothing more than a forum whereby the government perfects its case at the expense of the appellant's Sixth Amendment right to effective assistance of counsel." This assertion misses the mark. While the appellant's self-interest may "compel" him to claim that his lawyer was inept, this "compul-

> sion" does not allow him to re-claim his attorney-client privilege. An attack on an attorney's competence waives the attorney-client privilege as to matters reasonably related to the claim of inadequate representation.

United States v. Mansfield, supra, 33 M.J. at 97.

Similarly, The United States Court of Military Appeals stated:

> Before us, appellant again focuses on the turbulence generated by the initial trial defense team. He argues that their inadequacies compelled him to attack them in order to demonstrate the unfairness of his trial. To that end, he argues, it was necessary to bring into the light of day his highly incriminating statement, this statement which otherwise would have remained enshrouded by the attorney-client privilege. Thus, appellant contends, he was unfairly penalized in his subsequent rehearing by the prosecution's cross-examination of his witnesses and by the receipt in evidence of the statement.
>
> To put this in context, in order to present his mental responsibility defenses *at the second trial,* appellant found it necessary to call expert witnesses, armed with his incriminating statement, to testify about his mental condition at the time of the killing. In providing his witnesses with the statement in this manner, appellant waived his privilege with respect to it. But for this fact, we agree there would have made a dynamite issue. As the case stands, however, its resolution becomes a paradigm of simplicity.

United States v. Mansfield, No. 67-973, slip op. at 5-6 (C.M.A. 30 September 1993) (emphasis in original).

Both the Air Force Court of Military Review and the United States Court of Military Appeals erred by summarily dismissing the appellant's assertions on the basis of waiver. As the Montana Supreme Court correctly noted, "waiver" may not even be the correct term to use in this type of situation. That Court observed:

> While a petition for post-conviction relief alleging inadequate assistance of counsel has been held to be a waiver of the attorney-client relationship relating to privilege, *waiver may be a misnomer in the true sense of that legal term.* Waiver is the voluntary relinquishment of a known right. More important than the privilege granted to the attorney-client relationship are the effective administration of justice and integrity of the fact-finding system in criminal matters. Unlike the usual waiver situation, a petition by one convicted of a crime alleging that his conviction is the result of inadequate assistance of counsel attacks the system of judicial administration and the fairness of our trial procedures. . . . Therefore the comprehension of waiver by a petitioner . . . or his knowledge and consent to waiver are irrelevant.

In re Gillham 704 P.2d 1019, 1020 (Mont. 1985) (emphasis added).[8]

This Court has considered an analogous situation involving the question of whether the testimony of an accused during a

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[8] The government argued before the United States Court of Military Appeals that *In re Gillham* actually supported their position that an ineffective assistance of counsel claim waives any right to a claim of privilege. This is an overly broad reading of the case. *In re Gillham* did not address the use of evidence deduced during an evidentiary hearing in a subsequent retrial. The issue in the case was whether trial defense counsel was required to comply with an order to submit an affidavit to the appellate court.

suppression motion can be introduced against him during the trial. This Court observed:

> It seems obvious that a defendant who knows that his testimony may be admissible against him at trial will sometimes be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim. The likelihood of inhibition is greatest when the testimony is known to be admissible regardless of the outcome of the motion to suppress. . . .
>
> The rule adopted by the courts below does not merely impose upon a defendant a condition which may deter him from asserting a Fourth Amendment objection—it imposes a condition of a kind to which this Court has always been peculiarly sensitive. For a defendant who wishes to establish standing must do so at the risk that the words which he utters may later be used to incriminate him. Those courts which have allowed the admission of testimony given to establish standing have reasoned that there is no violation of the Fifth Amendment's Self-Incrimination Clause because the testimony was voluntary. As an abstract matter, this may well be true. A defendant is "compelled" to testify in support of a motion to suppress only in the sense that if he refrains from testifying he will have to forego a benefit, and testimony is not always involuntary as a matter of law simply because it is given to obtain a benefit. However, the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit. *When this assumption is applied to a situation in which the "benefit" to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created.*

> Thus, in this case Garrett was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. *In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another.*

Simmons v. United States, 390 U.S. 377, 392-393 (emphasis added).

A situation similar to the petitioner's was considered in *United States v. Suarez*, 820 F.2d 1158 (11th Cir. 1987). In that case, the accused pled guilty to various charges arising from the possession and transfer of weapons. Seven months later, Suarez requested an evidentiary hearing on the issue of whether his attorney had adequately disclosed the nature and consequences of his guilty plea. "At the hearing, Suarez *expressly waived* his attorney-client privilege to permit" his prior attorney, Feldman, to testify. 820 F.2d at 1159 (emphasis added). Following the hearing, the trial court set aside the guilty plea on the grounds that Suarez may not have been completely aware of the consequences of his plea.

During the subsequent jury trial, the prosecution called the attorney as a witness during its case in chief. The trial judge, over defense objection, "ruled that the attorney-client privilege had been waived as to the matters to which Feldman had testified at the prior evidentiary hearing, and the court allowed Feldman to testify." 820 F.2d at 1159. On appeal, Suarez argued that the rationale expressed in *Simmons v. United States, supra*, applied. In affirming the conviction, the Court of Appeals observed:

> Appellant's contention is an interesting and difficult one, but we need not address it in this case. After a careful review of the record, we have con-

> cluded that Suarez did not present to the district court the *Simmons* rationale as a basis for his objection to Feldman's testimony. He argued only that use of the testimony would violate his attorney-client privilege. Fed.R.Evid. 103(a) provides that error may not be predicated upon a ruling which permits evidence unless the specific ground for the objection is made clear. The nature of the error must be "called to the attention of the judge, so as to alert him to the proper course of action and enable opposing counsel to take proper corrective measures."[9]

Suarez, 820 F.2d at 1161.

The facts in *Suarez* are distinguishable from those present in the case *sub judice*. The petitioner did not expressly waive his attorney-client relationship. Instead, the parties made it clear that the release of privileged information during the evidentiary hearing was for the limited purpose of addressing the ineffective assistance claim. Further, the defense made the basis of their objection clear at the subsequent trial.

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[9] Military Rule of Evidence 103 is nearly identical to, and based on, Federal Rule of Evidence 103. The military rule makes it clear, however, that errors of a constitutional dimension are handled differently. The relevant section states:

> The standard provided in this subdivision does not apply to errors involving requirements imposed by the Constitution of the United States as applied to members of the armed forces except insofar as the error arises under these rules and this subdivision provides a standard that is more advantageous to the accused than the constitutional standard.

When a constitutional error is involved, the United States Court of Military Appeals has long held that the correct standard to apply is the one set forth by this Honorable Court in *Chapman v. California*, 386 U.S. 18 (1967). *See, e.g., United States v. Ward*, 1 M.J. 176 (1975).

> At Mansfield's second trial, his counsel contended the government could not use any evidence that they had gained access to, or become aware of, through the limited waiver of attorney-client privilege during the evidentiary hearing. *He argued that Mansfield only waived the privilege to show the ineffective assistance of his counsel at the first trial and use of this compelled evidence in the second trial would violate due process.*

Mansfield, supra, 33 M.J. at 1000 (Leonard, J., dissenting) (emphasis added).

The Arizona Court of Appeals has squarely addressed the petitioner's concerns in a similar case. In *Waitkus v. Mauet*, 757 P.2d 615 (Ariz. Ct. App. 1988), the accused raised a post-conviction claim of ineffective assistance of counsel. In response, the state sought discovery of his defense counsel's files. The trial court granted the state's request, but ruled that the prosecutor was prohibited from disclosing this information to other attorneys and that the county prosecutor's office had to withdraw from the case. On appeal the Arizona Court of Appeals vacated the order and noted:

> [These measures did] not avoid the obvious chilling effect the ruling has on a defendant's right to raise a claim of ineffective assistance of counsel. It appears to a defendant that the state will have access to information it could use in other proceedings in addition to information it could use in the event the new trial motion is granted.

757 P.2d at 616.

Before the Air Force Court of Military Review and the United States Court of Military Appeals, the petitioner, relying on *Waitkus, supra*, urged the adoption of a standard similar to that employed in *Kastigar v. United States*, 406 U.S. 441 (1972). While petitioner asserts that a *Kastigar* approach best

serves the interest of avoiding the "chilling effect" on accused who have meritorious claims of ineffective assistance of counsel, the result in petitioner's case would be the same should a *Simmons*-type standard be employed.

To demonstrate this position it is necessary to break the evidence down into the component parts. According to the Court of Military Appeals, "[w]ith respect to the prosecutor's direct introduction of the incriminating statement [Prosecution Exhibit 65], it was an admission by a party-opponent, Mil.R.Evid. 802(d)(2), and was admissible." *Mansfield, supra,* slip op. at 6. This position is overly simplistic and ignores the fact that the statement was introduced to establish that the petitioner was denied the protection afforded by the Bill of Rights, the right to effective assistance of counsel. An accused's testimony on a motion to suppress may also be an admission by a party-opponent, but the introduction of such testimony during the subsequent trial would be "intolerable." *Simmons, supra,* 390 U.S. at 394.

Of course, even under a *Simmons*-type analysis an accused may be impeached with otherwise inadmissible statements should he take the stand on his own behalf. *See, e.g., Harris v. New York,* 401 U.S. 222 (1971); *Oregon v. Hass,* 420 U.S. 714 (1975).[10] However, the suppressed statements cannot be used to impeach the testimony of *other* witnesses. *James v. Illinois,* 110 S.Ct. 648 (1990). As this Honorable Court noted in *James,* "an expanded impeachment exception likely would chill some defendants from calling witnesses who would otherwise offer probative evidence."[11] 110 S.Ct. at 654.

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[10] An accused can also be tried for perjury should he provide false testimony at the evidentiary hearing. *See, e.g., Tasby v. United States,* 504 F.2d 332 (8th Cir. 1974).

[11] Petitioner recognizes that the concern of the Court in *James* was that "the proposed expansion of the current impeachment exception would significantly weaken the exclusionary rule's deterrent effect on police misconduct." This Court has also observed, however, that "an expanded

The result should not turn on whether the witness is providing expert or lay testimony. The use of experts is not a *carte blanche* to smuggle in inadmissible evidence.

> Federal Rule of Evidence 705 [*sic*] provides that an expert may give an opinion on a matter without prior disclosure of the facts or data underlying his opinion, unless the court requires otherwise. "The expert may in any event be required to disclose the underlying facts or data on cross-examination." Fed.R.Evid. 705. While revealing the basis for an expert's opinion is allowed, such disclosure does not facilitate the admission of otherwise inadmissible evidence.

Polythane Systems v. Marina Ventures International, Ltd., 993 F.2d 1201, 1207 (5th Cir. 1993).[12] Both the Air Force Court of Military Review and the United States Court of Military Appeals have relied on this principle to exclude testimony in previous cases. *See, United States v. Myles*, 29 M.J. 589, 591 (A.F.C.M.R. 1989) ("This rule does not permit either party to 'smuggle' hearsay evidence into the case"); *United States v. Stark*, 24 M.J. 381 (C.M.A. 1987).

The government argued at trial, as well as on appeal, that the cross-examination of the experts through the use of the long version of the petitioner's "Life Story" was proper because the experts relied upon it in forming their opinions. The Air Force Court of Military Review summarily disposed of petitioner's arguments to the contrary by simply stating that

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impeachment exception likely would chill some defendants from calling witnesses who would otherwise offer probative evidence." 110 S.Ct. at 654. A similar chilling effect would occur should cross-examination be permitted using testimony otherwise inadmissible under a *Simmons* analysis.

[12] Military Rules of Evidence 703 and 705 are identical to, and based on, the Federal Rules.

"appellate counsel are arguing semantics. It is clear that defense psychiatrists used the statement in reaching a diagnosis." *Mansfield,* 33 M.J. at 985. The United States Court of Military Appeals relied on this brief language to hold that "the majority of the Court of Military Review squarely found" the statement was relied upon by the experts. *Mansfield,* slip op. at note 4. The Court of Military Appeals, therefore, found it unnecessary to decide whether the experts "used" the statement.

However, as the dissenting judge on the Air Force Court of Military Review correctly noted,

> The mere release of the narrative statements to trial counsel did not necessarily give him the authority to use the statements outside his interviews with the defense psychiatrists. His ability to use the statements in cross-examination depended upon the circumstances of each psychiatrist's access to the statement and the extent, if any, the expert relied upon the statement to form his opinion.
>
> Doctors Beck, Coburn, and Strefling had no previous involvement with any mental examination ordered under [Rule for Courts-Martial] 706(b). Neither Beck or Strefling were potential expert witnesses at the first trial and they did not testify at the evidentiary hearing. They reviewed both versions of the narrative statement to prepare them for expected cross-examination. Appellant related portions of the first narrative statement to Doctor Coburn during interviews in preparation for the first trial. Coburn also reviewed both versions during his testimony at the evidentiary hearing. None of the three testified that he relied upon either narrative statement as a basis for his opinion.

Mansfield, 33 M.J. at 1005 (Leonard, J., dissenting). As Judge Leonard observed, but for the fact that an evidentiary hearing

was required, none of the witnesses would have been exposed to the statement. But for the fact that the trial judge at the retrial ruled the prosecution could use the statement on cross-examination, none of the experts (with the exception of Doctor Coburn who saw the statement at the evidentiary hearing) would have even seen the statement. The addressing of the statements on direct was simply a recognition that disclosure was a *fait accompli* given the military judge's ruling.

CONCLUSION

Ensuring that convictions are obtained in a manner which is fundamentally fair and reliable is the bedrock of the Due Process Clause of the Fifth Amendment. As such, the important issue presented in this case affects not only the interests of the petitioner, but that of all citizens. The effective assistance of counsel, as guaranteed by the Sixth Amendment, is an indispensable and inseparable component in satisfying these constitutional concerns. We necessarily rely upon the accused themselves to bring these matters to the attention of the courts. When a court orders an evidentiary hearing to address these issues and thereafter reverses the conviction, the court has made a finding that society cannot feel confident that the conviction was fundamentally fair and reliable. To permit the government to use attorney-client communications, disclosed for the purpose of exposing a constitutionally infirm conviction, will only chill the assertion of similar claims in the future. For all the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1993

APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 67,973
CMR No. 24758

UNITED STATES, APPELLEE

v.

CLYDE E.L. MANSFIELD, STAFF SERGEANT
U.S. AIR FORCE, APPELLANT

Argued June 3, 1993.
Decided Sept. 30, 1993.

For Appellant: *Major Marilyn A. Gordon* (argued); *Colonel Terry J. Woodhouse* (on brief); *Lieutenant Colonel Frank J. Spinner, Major Mary C. Yastishock, Major Alice M. Kottmyer.*

For Appelle: *Captain Jane M.E. Peterson* (argued); *Colonel Richard L. Purdon* and *Lieutenant Colonel Jeffery T. Infelise* (on brief); *Lieutenant Colonel Brenda J. Hollis, Major Jeffrey C. Lindquist, Major Morris D. Davis, Major Paul H. Blackwell, Jr.*, and *Captain James C. Sinwell.*

Military Judges: ROBERT M. RICHARDS (trial), PHILIP F. O'NEILL (DuBay), JIMMY D. PUETT (rehearing).

Opinion of the Court

COX, Judge:

I

The critical facts of this appeal can be succinctly stated: Appellant made a highly incriminating statement to one of his original trial defense counsel, though he later recanted the incriminating portions of it. This statement, when made, clearly fell within the protection of the attorney-client relationship. Mil.R.Evid. 502. Ultimately, the incriminating version of the statement was provided by the defense to various psychiatrists enlisted by the defense to assist in the preparation and advancement of an insanity/partial-mental-responsibility defense. At the court-martial in question, appellant presented an insanity/partial-mental-responsibility defense. The various defense experts testified on direct examination that appellant lacked mental responsibility or was only partially mentally responsible.

Over defense objection, the military judge permitted the prosecution to cross-examine the defense experts about the content of the incriminating statement and its impact on their conclusions. The judge also permitted the prosecution, in rebuttal, to introduce into evidence a copy of the statement. The primary questions before us, then, are whether the judge erred in permitting the prosecution access to and use of the incriminating statement.[1]

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[1] These issues, as assigned by appellant, were:

I

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED IN FINDING THAT APPELLANT WAS NOT DENIED A FAIR RETRIAL AS A RESULT OF THE GOVERNMENT'S ACCESS TO, AND PROBABLE USE OF, ATTORNEY-CLIENT PRIVILEGES THAT WERE DIS-

So framed, the issues admit of Hornbook-style resolution. We hold that the judge did not err in permitting the cross-examination of the defense experts or in permitting introduction of the statement.

II

The critical facts emerge from the somewhat more involved backdrop of a court-martial, a limited evidentiary hearing, and a rehearing. Prior to the initial trial, appellant made a series of statements, both oral and written, to his counsel. These several statements varied widely in content as to the degree of recollection and culpability admitted. Ultimately, according to counsel, appellant settled upon a particular, innocuous version of the facts. This version was provided selectively to potential civilian expert witnesses enlisted to assist in the preparation of a mental responsibility defense. Appellant was thereafter tried (September 4-November 27, 1984) by a general court-martial on a charge of premeditated murder. Art. 118(1), Uniform Code of Military Justice, 10 USC § 818(1). While this court-martial was in progress, defense counsel discovered that appellant had made a seriously incriminating admission to one of

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CLOSED IN AN EARLIER *DUBAY* HEARING ON APPELLANT'S SUCCESSFUL CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

II

WHETHER THE MILITARY JUDGE ERRED, TO THE SUBSTANTIAL PREJUDICE OF APPELLANT, WHEN HE ADMITTED PROS. EX. 65.

In addition, we granted review of two separate issues wherein appellant challenged the authority of the military judge and the Court of Military Review under the Appointments Clause. U.S. Const., art. II, § 2, para. 2, cl. 2. We resolve both of those issues adversely to appellant in accordance with our opinion in *United States v. Weiss*, 36 MJ 224 (CMA 1992), *cert. granted*, 113 S.Ct. 2412 (1993).

the defense psychiatrists. Realizing that the prosecution would readily discover this admission through cross-examination, defense counsel elected not to call the witness or to present the mental responsiblity defenses to prevent disclosure of the admission. (24 MJ at 615-16) In default, the court-martial was contested on a theory of failure of proof, and appellant was convicted as charged.

On appeal before the Court of Military Review, appellant attacked his trial defense team. He theorized that counsel must have been incompetent in bungling and failing to present his lack of mental responsibility defenses. In starkly inconsistent alternative, however, appellant also suggested that counsel may have been attempting to perpetrate a fraud upon the court-martial. In appellant's hypothesis, the fraud would have arisen from counsel's preparation and dissemination of the sanitized version of the statement, which counsel knew to be false and misleading, to potential defense witnesses. In attempting to manipulate the experts, and thus to "create" a defense where none existed, counsel's actions allegedly prejudiced appellant when it appeared the true facts would come out, collapsing the fraudulent defense in mid-trial. (Supplemental Brief on Behalf of Appellant, Feb. 7, 1986).

In the face of these serious allegations before the Court of Military Review, the Government joined appellant in petitioning that court to order a limited hearing into the conduct of

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[1] Certainly appellant's urine was "fungible" at that point. There was nothing distinctive about her urine that would differentiate it from other urine or that would differentiate it from her urine which might be tampered with in some way. Further, there was nothing distinctive about its "packaging" that would make it anything other than fungible, since the containers were typical of those provided by the Government for urinalysis inspections. *Cf. United States v. Courts*, 9 MJ 285 (CMA 1980); *United States v. Fowler*, 9 MJ 149 (CMA 1980); *United States v. Nault*, 4 MJ 318 (CMA 1978).

counsel and the preparation of the mental responsibility defenses. *See United States v. DuBay*, 17 USCMA 147, 37 CMR 411 (1967). The court obliged the parties. (Unpublished order dated March 5, 1986).

The military judge conducting the limited hearing compelled the new defense team, over their objection, to produce both the incriminating and the innocuous versions of appellant's statement. Both were received as hearing exhibits. The hearing (May 6-8, 1986) featured an intense grilling of all members of the original defense team regarding their preparation of the mental responsibility issues. Particular emphasis was placed on the circumstances surrounding the origin of the incriminating statement and its sanitized counterpart. In addition, both the of the psychiatrists slated to testify for the defense at the original trial testified. Both indicated that, from a psychiatric point of view, appellant's incriminating revelation did not significantly alter their conclusions regarding his mental state at the time of the killing. At the conclusion of the hearing, the military judge entered extensive findings, including the finding that "the potential defenses of insanity and of partial mental responsibility were not 'created' defenses. . . ." (Findings at 15).

On return to the Court of Military Review, appellant omitted the fraud allegation. He relied exclusively on the claim of incompetence through failing to prepare and present the mental responsibility defenses. The Court of Military Appeals agreed that the original trial defense team's preparation on the issue of mental responsibility was inadequate. Accordingly, that court set aside the findings of guilty and the sentence, authorizing a rehearing. 24 MJ 611, 617-18 (1987).

The rehearing (June 29-December 9, 1987) was duly convened by a different convening authority. None of the original defense team represented appellant at the rehearing. At the rehearing, appellant formally asserted defenses of lack of

mental responsibility and partial mental responsibility. In support of these defenses, a number of experts were presented as defense witnesses. As previously indicated, each had been provided by the defense with the incriminating version of appellant's pretrial statement. Each witness acknowledged taking appellant's statement into consideration in articulating his opinion at trial. As indicated, the Government was permitted, over defense objection, to cross-examine these witnesses about the statement[2] and to introduce a copy of the statement into evidence. Appellant was again convicted of premeditated murder and was sentenced to a dishonorable discharge, confinement for life, reduction, and forfeitures. The convening authority approved the sentence, and the Court of Military Review affirmed. 33 MJ 972 (1991).

III

Before us, appellant again focuses on the turbulence generated by the initial trial defense team. He argues that their inadequacies compelled him to attack them in order to demonstrate the unfairness of his trial. To that end, he argues, it was necessary to bring into the light of day his highly incriminating statement, this statement which otherwise would have remained enshrouded by the attorney-client privilege. Thus, appellant contends, he was unfairly penalized in his subsequent rehearing by the prosecution's cross-examination of his witnesses and by the receipt in evidence of the statement.

To put this in context, in order to present his mental responsibility defenses *at the second trial*, appellant found it necessary to call expert witnesses, armed with his incriminating statement, to testify about his mental condition at the time of the killing. In providing his witnesses with the statement in this

[2] Indeed, as to each defense expert, it appears that it was the defense on direct examination that first adverted to the incriminating statement.

manner, appellant waived his privilege with respect to it. But for this fact, we agree there would have made a dynamite issue.[3] As the case stands, however, its resolution becomes a paradigm of simplicity.

There is no physician-patient or psychotherapist-patient privilege in federal law, including military law. Under certain circumstances, here presumptively present, a physician, psychotherapist, etc., who assists the defense in the preparation of a defense may fall within the scope of the attorney-client privilege. Statements or information provided to such experts are privileged to the extent of the protection of the attorney-client privilege. *United States v. Tharpe*, ___ MJ ___ (CMA 1993); *United States v. Toledo*, 25 MJ 270, 275-76 (CMA 1987). However, when such experts are called as a witness on behalf of an accused and the witness has relied upon statements of the accused in formulating an opinion,[4] the attorney-

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[3] The scenario could potentially arise anytime an accused makes an incriminating statement, falling within the attorney-client privilege, to counsel. If the accused subsequently accuses counsel of unethical conduct or incompetence in connection with that statement, such that the statement must be revealed to enable a court to determine whether unethical conduct or prejudice has occurred, has the accused waived the attorney-client privilege with respect to that statement, and if so to what extent? Does it matter if the alleged unethical conduct or incompetence has not occurred? We defer resolving these matters until such time as they are in issue before us.

[4] In this case, the majority of the Court of Military Review squarely found that it was "clear that defense experts used the statement in reaching a diagnosis." 33 MJ at 972. The record of trial strongly supports this conclusion, and we accept the Court of Military Review's finding. Art. 67(c), UCMJ, 10 USC § 867(c) (1989). Thus, technically, it is not necessary on this record for us to reach a broad conclusion regarding the admissibility of any and all statements made by an accused to a physician/psychotherapist tendered by the defense, regardless of whether the statements were "used" by the expert in arriving at conclusions. *But cf. Noggle v. Marshall*, 706 F.2d 1408 (6th Cir. 1983), *cert.*

client privilege terminates with respect to those matters placed in issue by the expert's testimony. *United States v. Toledo, supra; United States v. Frederick,* 3 MJ 230, 233-34 (CMA 1977); *see generally* McCormick on Evidence 384 (4th ed. 1992); *cf.* Mil.R.Evid. 302(c), Manual for Courts-Martial, United States, 1984. Further, any expert who offers a testimonial opinion is subject, at the request of a party opponent, "to disclose the underlying facts or data on cross-examination." Mil.R.Evid. 705. Thus the rehearing military judge did not err in permitting the cross-examination of the defense experts.

With respect to the prosecution's direct introduction of the incriminating statement, it was an admission by a party-opponent, Mil.R.Evid. 801(d)(2), and was admissible. Its relevance and authenticity were established beyond cavil. These two assignments of error are without merit.

IV

The remaining granted issue asks whether the military judge correctly instructed the court members regarding the defense of partial mental responsibility; we resolve the issue as did the Court of Military Review. 33 MJ at 990. The Uniform Code of Military Justice has never identified a defense of "partial mental responsibility." However, the Manual for Courts-Martial in effect for appellant's initial trial (Manual for Courts-Martial, United States, 1969 (Revised edition) (as amended through Change 7, effective September 23, 1982), described a limited defense of "partial mental responsibility," as being: "A mental condition . . . which produces a lack of mental ability . . . to possess actual knowledge or to entertain a specific

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denied, 464 U.S. 1010 (1983); *State v. Tensley,* 249 N.W.2d 659 (Iowa 1977); *Townsend v. State,* 420 So.2d 615 (Fla. App. 1982), *pet. denied,* 430 So.2d 452 (Fla. 1983); Annotation, *Privilege, in Judicial or Quasi-Judicial Proceedings, Arising From Relationship Between Psychiatrist or Psychologist and Patient,* 44 A.L.R.3d 24 (1972).

intent or a premeditated design to kill. . . ." Para. 120*c*.[5]

Without defense objection, the military judge rendered an instruction at the rehearing on the defense of partial mental responsibility in general accordance with the standard instructions set forth in paragraph 6-5, Military Judges' Benchbook at 6-4 (Dept. of the Army Pamphlet 27-9 (1985)). Appellant now complains that the instruction was deficient in that the judge omitted a phrase indicating that appellant need not be insane in order to qualify for the defense of partial mental responsibility. Final Brief at 90. Like the Court of Military Review, we have carefully read the entirety of the military judge's instructions. There is no intimation in the instructions that appellant needed to be "insane" in order to qualify for partial mental responsibility. Indeed, we can detect no linkage whatever in the instructions between the limited defense of partial mental responsibility and the complete defense of "insanity" (lack of mental responsibility). We do not doubt that the clarification now urged by appellant would have been appropriate. However, we do not believe it was a *sine qua non* or that the instructions given were incomplete or confusing. We hold that the objection now advanced was waived, and no plain error occurred. *United States v. Fisher*, 21 MJ 327 (CMA 1986).

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges CRAWFORD, GIERKE, and WISS concur.

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[5] The Manual for Courts-Martial, United States, 1984, deletes reference to a defense of partial mental responsibility. *But see United States v. Berri*, 33 MJ 337 (CMA 1991); *Ellis v. Jacob*, 26 MJ 90 (CMA 1988).

APPENDIX B

U.S. AIR FORCE COURT OF MILITARY REVIEW

ACM 24758 (f rev)

UNITED STATES

v.

STAFF SERGEANT CLYDE EDWARD LYMAN MANSFIELD,
FR 048-44-1263 UNITED STATES AIR FORCE.

Sentence adjudged 27 Nov. 1984
24 April 1987

Approved Sentence: Dishonorable discharge, confinement for length of natural life, forfeiture of all pay and allowances and reduction to airman basic.

Appellate Counsel for the Appellant: Luther C. West, Baltimore, Maryland, Colonel Leo L. Sergi and Major Timothy J. Malloy.

Appellate Counsel for the United States: Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni, Major David F. Barton and Captain Marc Van Nuys.

Before HODGSON, FORAY and MURDOCK, Appellate Military Judges.

DECISION

HODGSON, Chief Judge:

The appellant was convicted of the premeditated murder of his paramour's former husband. He was sentenced to life imprisonment together with ancillary punishments.

The paramount issue before us goes to the heart of our adversarial process—the right to the effective assistance of counsel in presenting a defense. In this regard the appellant claims that his trial attorneys failed to investigate, prepare and present properly either an insanity or diminished capacity defense. We agree.

In the initial appellate pleadings this issue centered on the question of whether trial defense counsel committed the appellant to an insanity defense without weighing the consequences of such a defense, i.e., disclosure of damaging inculpatory statements by the appellant to his expert witness, and thereafter abandoning the defense midway through the trial because of the trial judge's order compelling production of these statements. *See United States v. Parker*, 15 M.J. 146 (C.M.A. 1983). The defense, by its questioning of members during *voir dire*, cross-examination of prosecution witnesses, and pretrial declarations to the prosecution, made it clear that the appellant's mental condition was the core issue in the trial.

This claim of ineffective assistance of counsel is based on the representation made by the appellant's trial lawyers to the military judge that Doctor Michael B. Coburn would not be called as a witness because of the judge's order directing production of a statement made by the appellant at the direction of his counsel which was given to Doctor Coburn. Doctor Coburn was a defense psychiatrist who had travelled from the United States to Korea and was waiting outside the courtroom while this discussion took place. At trial, counsel asserted that the judge's ruling "[A]ffected the entire strategy of the defense" and their post-trial affidavits contends that "[T]he defense was precluded from presenting to the trier-of-fact expert opinion regarding the issue of the accused's mental responsibility, an affirmative defense."

On 3 January 1986, appellate government counsel responded to this issue with a reply brief and supporting affidavits from the

defense counsel involved. Subsequently, the appellant moved to file a supplemental brief contending that the post-trial statements of trial defense counsel expanded the issue of ineffective asssitance of counsel by raising additional questions of: (1) Whether defense counsel acted improperly and contrary to their obligation to the appellant and the court by instructing him to withhold material information from Doctor Coburn, a defense psychiatrist, and (2) Whether this conduct so prejudiced the appellant that he was denied effective assistance of counsel and therefore a fair trial.

On 11 February, government and appellate defense counsel jointly and severally asked for a limited evidentiary hearing because the trial transcript, pleadings and supporting affidavits suggested there were substantial and unresolved questions involving the appellant's lack of mental responsibility and claim of ineffective assistance of counsel. We ordered such a hearing and it was held on 6-8 May 1986. *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967). The trial judge who conducted the hearing prepared and submitted extensive findings of fact which have made our task measurably easier.

I

The trial and evidentiary hearing transcripts disclose that the appellant was apprehended at Edwards Air Force Base, California on 5 April 1984, for the murder of Yang Chae-Song, near Osan Air Base, Korea, on 4 February 1984. It was at Edwards, during a pretrial confinement hearing, that the appellant entered into an attorney-client relationship with Captain P, the Area Defense Counsel. Captain P became one of four military lawyers who assisted in the appellant's defense. The other three were the Chief Circuit Defense Counsel for the 7th Circuit, Lieutenant Colonel N, Circuit Defense Counsel, Major P, and the Area Defense Counsel at Osan Air Base, Major, then Captain, H. It was during the confinement hearing that Captain P

became aware of the appellant's "bizarre behavior" and "obsession" with Un-Cha Haney who was the Korean wife of an Air Force member, the former wife of the deceased, and the appellant's lover. Captain P did not, however, pass this information, or his assessment of it to his co-counsel.

After the appellant was returned to Korea on 20 April, he was sent to Yokota Air Base, Japan for a sanity board hearing. He refused to participate in the proceeding on advice of counsel as his attorneys did not yet know enough about the case. Later, in June, Lieutenant Colonel N and Major H requested a sanity board citing the appellant's "preoccupations and obsessions," his behavior described by numerous individuals as "crazy and bizarre," and his referral to the Mental Health Clinic at Edwards by his unit commander in early January 1984. On 21, 22 and 25 June, he met a one member sanity board consisting of Lieutenant Colonel (Doctor) Robert L. Vosburg. Doctor Vosburg was of the opinion that the appellant had a mental disorder described as a post traumatic neurosis, chronic. *See American Psychiatric Institute, Diagnostic and Statistical Manual for Mental Disorders (DSM)*, 3d Ed. 1980, page 326. In Doctor Vosburg's view the appellant had a diminished capacity to appreciate the criminality of the alleged offense and lacked the capacity to conform his conduct to the law as a result of the mental disorder. The appellant's attorneys were both "somewhat surprised" and "elated" with the outcome of the sanity board, and it was at this time the defense team first considered insanity to be a viable defense. However, Major H was concerned that Doctor Vosburg lacked experience and might not be a "strong witness." Despite this doubt, he did not discuss the insanity defense with Doctor Vosburg because Major P was responsible for preparing this aspect of the trial.

The "team concept" employed by the appellant's attorneys is troublesome because no lawyer served as "lead counsel". Therefore no one was totally familiar with the overall posture of

the case and no one could be the final arbiter on tactics and strategy. It is also apparent that after it was decided to focus the defense efforts on the sanity issue, Lieutenant Colonel N became less active in the ongoing trial preparations, although both Majors P and H regularly consulted him by phone.

At this point the appellant's counsel felt they needed additional expert testimony to bolster Doctor Vosburg's opinion. Knowing that the appellant would be returned to Edwards for a portion of the pretrial investigation, they arranged for Captain P to locate civilian psychiatrists in the local area. Captain P set up appointments with Doctors Michael B. Coburn, John Beck, and William T. Vicary. Although Captain P and the appellant still had an attorney-client relationship, he never discussed the results of these evaluations with the examining psychiatrists or with the other defense counsel. It is evident that Captain P's involvement with the case substantially diminished after Majors P and H were appointed and that he did not regard himself as an active member of the defense team. There is also a suggestion that the appellant was dissatisfied with Majors P and H, and wanted Captain P to represent him. Captain P did not encourage the appellant in this regard, and explained the advantages of having lawyers who were near the trial location.

Later, Captain P did have some contact with Doctor Coburn over the logistics of the latter's trip to Korea as an expert witness. He did not, however, discuss with Doctor Coburn his opinions as to the appellant's mental state.

Subsequent to the psychiatric evaluations, Captain P realized that Doctor Vicary could support a defense of partial mental responsibility, but made no attempt to discuss his conclusions with the psychiatrist or to pass this information to his co-counsel.

On 16 August, Doctor Beck sent Captain P a written evaluation of his examination of the appellant. Doctor Beck concluded that at the time of the alleged offense the appellant had a mental

defect, i.e., a Mixed Personality Disorder and as a result of such mental defect he lacked capacity to conform his conduct to the requirements of law. At the time of the evidentiary hearing, Captain P did not recall the letter's contents and surmised he had forwarded it to Majors P and H who received it before trial. Neither Major P nor Major H considered Doctor Beck's diagnosis to support an insanity defense. *But see United v. Benedict*, 20 M.J. 939 (A.F.C.M.R. 1985) holding that the term "mental defect" includes any abnormal condition of the mind, regardless of its medical label, that substantially affects mental or emotional processes and substantially impairs behavior controls.

Finally, in September, Doctor Coburn called Captain P to advise him that he had changed his initial opinion and he could now support an insanity defense. Doctor Coburn sent Captain P a written evaluation, and the latter forwarded it to co-counsel in Korea.

Both Majors P and H were present during the pretrial investigation held at Edwards on 26 July. Major H did not contact the three civilian psychiatrists while he was in California because he regarded Major P to be the "defense team member" responsible for the insanity defense.

Likewise, Major P, the attorney responsible for presenting the insanity defense, did not interview the civilian psychiatrists while he was at Edwards. Apparently, he was led to believe that all three doctors found that the appellant had a personality disorder and that their expert testimony would not support an insanity defense. It was also his understanding that an insanity defense could not be based on a personality disorder. As stated earlier this position is not supported by case law. *See United v. Benedict*, supra; *United States v. Krauss*, 20 M.J. 741 (N.M.C.M.R. 1985); *United States v. Haywood*, 18 M.J. 562 (A.C.M.R. 1985).

During the pretrial investigation both attorneys learned of approximately 37 lay witnesses who felt the appellant was

"strange" or "crazy." In a 29 October 1984 letter, they asked government counsel to provide the names and addresses of these witnesses. Other than this request, there is no indication that this lay witness evidence was explored, evaluated or marshalled to contribute to an insanity defense in any meaningful way.

After Doctor Coburn concluded he could support an insanity defense, Major P contacted him by telephone from Japan. He did not, however, discuss Coburn's testimony with him until the latter's arrival in Korea. It was at this time that Major P first provided Doctor Coburn with the definition of insanity that would be applied in a military court-martial. See Air Force Regulation 160-42, *Psychiatry in Military Law*, 25 September 1981. Major P was aware of Doctor Beck's evaluation, but never discussed it with him because of Major P's assumption that it would not support an insanity defense. Likewise, he never discussed Doctor Vicary's opinion with Vicary although it could have supported the potential defense of partial mental responsibility. Neither Major P nor his co-counsel ever pursued this potential defense notwithstanding the opinions of every defense psychiatrist who examined the appellant that he had an emotional disorder.

The law is clear that a mental condition not amounting to a general lack of mental responsibility but which produces at the time of the offense a lack of mental ability to enter a *premeditated design to kill* is a defense to an offense having this state of mind as an element. R.C.M. 916(k)(2); *see also United States v. Erb*, 30 C.M.R. 938 (A.F.B.R. 1960), *aff'd* 12 U.S.C.M.A. 524, 31 C.M.R. 110 (1961).

In early September 1984, the trial judge ordered the appellant to submit to a second sanity board to be convened at Travis Air Force Base, California. This board, consisting of three psychiatrists, opined that the appellant did not have a mental disease or defect. No effort was made by either Major P or Major H to

have Captain P, who was stationed in California, interview the members of the second sanity board; nor did Major P interview the board president until after his arrival in Korea as a government witness just before the beginning of or early in the trial.

After Major H met the appellant in late April 1984, he obtained from him an oral version of the circumstances surrounding the commission of the offense which he later reduced to writing. This statement suggested a high degree of culpability on the appellant's part. Because Major H concluded that the appellant was not completely forthcoming with the facts, he edited the first written statement into a second written statement. Since the appellant later recanted much of the inculpatory information in the first statement, indicating that some of the story was false, embellished, or dreamed, Major H edited the first statement to include only information that was to some degree, verifiable. The appellant's first version indicated he had hired a "hit man," a Korean national, to kill the victim. The second written statement became the factual scenario the appellant was instructed by his lawyers to give during psychiatric interviews. This version omitted information relating to the possible procurement of a "hit man," purchase of a knife shortly before the homicide and the manner of its use at the scene.

Both Doctor Vosburg and Doctor Coburn eventually learned of the "hit man" aspect of the appellant's story and both indicated it did not substantially effect their diagnoses of his mental condition.

When Doctor Vosburg arrived in Korea he was interviewed at length by the appellant's co-counsel. Although Vosburg basically agreed with Coburn as to the appellant's mental state, both counsel still considered him a weak witness because he was "nervous" about testifying since he was not a forensic psychiatrist.

Doctor Coburn arrived in Korea approximately the same day the prosecution rested its case-in-chief. He was prepared to

testify that at the time of the offense the appellant was "*substantially lacking the capacity to have conformed his conduct to the requirements of law [that] substantially diminish[ed] his capacity to have appreciated the criminality of his conduct . . .*" He would further state that the appellant "*was acting in a significantly and substantially impaired state at the time of the offense, substantially lacking in capacities requires continuing treatment because suicidal potential.*" (Emphasis added).

The decision to abandon the insanity defense was made after Doctor Coburn's arrival in Korea and the discovery of the "hit man" information in his notes. Appellant's counsel believed disclosure of this information would have had a devastating impact and would have created a substantial risk of their client's conviction of premeditated murder. Additionally, they were convinced that the value of Coburn's testimony was lessened as counsel were not prepared to deal with the "hit man" factor of his testimony. Of course, the reason Doctor Coburn was not aware of this information earlier was that the defense team had withheld it. In the evidentiary hearing, Doctor Coburn stated that the "hit man" disclosure had not changed his opinion regarding the appellant's lack of mental responsibility and could have been accommodated in his explanation of psychodynamics of the events leading up to the homicide.

Appellant's counsel stated during the evidentiary hearing that they were aware from the outset that if they presented expert testimony of a psychiatrist as to the appellant's mental condition, they would be required to produce materials and statements by the appellant, which had been used by their witness for use during cross-examination. *See United States v. Parker, supra.* They contended that their claim in the *Goode* response that the trial judge's ruling was erroneous and caused the collapse of the insanity defense was merely a *pro forma* assertion of error without any belief in its validity. *United States v. Goode,* 1 M.J. 3 (C.M.A. 1975).

Appellant's counsel maintained they had proceeded from the beginning with a two-pronged strategy: first, to put the prosecution to its to establish beyond a reasonable doubt that the appellant had killed the victim; and, second, to demonstrate the appellant's lack of mental responsibility for commission of the offense. For reasons discussed earlier, the decision was made not to present any evidence, including evidence touching on the appellant's lack of mental responsibility. The Chief Circuit Defense Counsel, Lieutenant Colonel N, discussed the situation with co-counsel, and even though he thought there was an "overwhelming danger" in abandoning the insanity defense at that point in the trial, he chose no to "override" their decision. When trial defense counsel consulted Captain P, he told them he thought the decision a "dangerous" course of action.

II

The Sixth Amendment and the Uniform Code of Military Justice guarantee a criminal defendant reasonably effective assistance of counsel. Article 27(a), U.C.M.J., 10 U.S.C. § 827(a); *Cuyler v. Sullivan*, 446 U.S. 335, 344, 100 S.Ct. 1708, 1716, 64 L.Ed.2d 333 (1980); *United States v. Jefferson*, 13 M.J. 1 (C.M.A. 1982). But this right does not mean that appellate courts should vacate a conviction on a claim of ineffective counsel in the absence of a display of a serious lack of skills that are regularly found in the performance of fallible lawyers. *United States v. DiCupe*, 21 M.J. 440 (C.M.A. 1986); *see also United States v. DeCoster*, 624 F.2d 196 (D.C.Cir. 1979). Because claims of inadequate representation are oft-times made by disaffected clients seeking to assign the blame for their predicament to their lawyers rather than themselves, the law presumes that counsel is effective, and places upon an appellant the burden of establishing ineffectiveness. *Commonwealth v. Molina*, 358 Pa.Super. 28, 516 A.2d 752 (1986).

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court set out a two part

test to determine whether a conviction should be set aside on the ground that the trial defense counsel was ineffective: (1) the appellant must show that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. To satisfy the first prong of the test, the appellant must show that counsel's actions fell beneath an objective standard of reasonable professional assistance. The second prong is satisfied by showing that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. An insufficient showing of prejudice leads to a rejection of the claim without inquiry into the adequacy of counsel's performance. Of course, the mere fact that conviction has resulted does not meet the criteria of prejudice. *See Bates v. Blackburn*, 805 F.2d 569 (5th Cir. 1986).

The standards of what constitutes ineffective assistance of counsel utilized by most of the federal courts have been adopted by the military appellate courts. *United States v. Jefferson*, supra. In *United States v. Rivas*, 3 M.J. 282, 288 (C.M.A. 1977), the Court of Military Appeals stated:

> We believe that to exercise the skill and knowledge which normally prevails within the range of competence demanded of attorneys in criminal cases requires that the attorney act as a diligent and conscientious advocate on behalf of his client.

Disagreements as to the strategic or tactical decisions made at the trial level by defense counsel will not support a claim of ineffective assistance of counsel so long as the challenged conduct has some *reasoned* basis. Appellate courts will not review the wisdom of a defense counsel's tactic unless it lacks a *plausible* basis. *United States v. Rivas*, supra; *United States v. Rogan*, 19 M.J. 646 (A.F.C.M.R. 1984); see also *State v. Stone*,

151 Ariz. 455, 728 P.2d 674 (1986); *Bass v. State*, 713 S.W.2d 782 (Tex.App. 1986). Any claim of inadequate representation is to be determined by the facts of that particular trial and the existing circumstances under which counsel's decisions were made. See generally *Makenson v. State*, 719 S.W.2d 112 (Mo.App. 1986).

The basic claim of error made by appellant's appellate counsel is that the defense lawyers in the trial below failed to investigate, prepare and present evidence which would properly support the defense of insanity or diminished capacity so as to reduce the degree of guilt.

The right to reasonably competent counsel includes a correlative duty on defense counsel to undertake reasonable steps to investigate all open avenues of defense. *Wood v. Zahradnick*, 578 F.2d 980 (4th Cir. 1978). We think a reasonable level of competence to be demanded of attorneys in criminal cases is to investigate facts known to, or with diligence accessible to them, which would raise a reasonable doubt as their client's mental condition. *Osborne v. Commonwealth*, 378 Mass. 104, 389 N.E.2d 981 (1979).

We have no doubt that defense counsel in the trial before us honestly and sincerely attempted to insure that the appellant was provided every possible defense. Much of what they did during the trial and before demonstrates diligent and conscientious endeavors on their part to represent their client properly. Unfortunately, their collective efforts with regard to the defense of insanity did not rise to the level of representation than the law requires.

From the outset it appears that no one counsel was given overall responsibility of orchestrating the defense efforts. Responsibility was divided so that everyone was in charge and yet no one was in charge. For example, the Chief Circuit Defense Counsel thought the decision to abandon the insanity defense was "overwhelmingly dangerous" at that point in the proceed-

ings, yet did not use his position as the professional supervisor of defense counsel to intercede. See Air Force Manual 111-1, *Military Justice Guide,* 1 August 1984, para. 13-3e. Although, Captain P was the first counsel to enter into an attorney-client relationship with the appellant, he did not consider himself part of the "defense team" and limited his participation to providing logistical support for appointments with the psychiatrists. After Majors P and H arrived at Edwards for the pretrial investigation, neither they nor Captain P ever spoke with the three civilian psychiatrists as to the results of their interviews with the appellant. It was through casual conversations with legal office personnel that Major P "heard" that all three doctors concluded that the appellant had a personality disorder. Additionally, both Majors P and H appeared to be unaware that a personality disorder can be the basis of an insanity defense or can be used to lessen the degree of culpability of the offense charged, i.e., premeditated to unpremeditated murder. *See* R.C.M. 916(k)(2); *United States v. Benedict, supra; United States v. Krauss, supra; United States v. Heywood, supra.* Further, none of the attorneys interviewed or evaluated the numerous lay witnesses who thought the appellate was "strange" or "crazy." In this regard Captain P was stationed at the same base as these witnesses.

Although defense counsel asserted during the evidentiary hearing that the insanity defense was but one defense theory, the other being to put the government to its proof on the evidence proper, the thrust of *voir dire*, challenges, preliminary instructions by the trial judge, and questioning of prosecution witnesses clearly made insanity the core of the appellant's defense. In this context, to uphold the decision to abandon this defense after the prosecution rested would require an explanation that is reasoned and plausible. Such an interpretation is not possible in this case.

Doctor Coburn, a forensic psychiatrist with impressive credentials, appears to be the key to the appellant's insanity de-

fense. He had examined over 800 defendants in homicide cases as well as thousands of other offenders. He was prepared to testify that the appellant was legally insane. The basis for foregoing Coburn's testimony was the knowledge that the prosecution knew about the "hit man" aspect of the appellant's prepared statement, and this disclosure was "devastating" to both the defense theories, i.e., reasonable doubt and insanity. During oral argument appellate government counsel suggested that the available prosecution rebuttal evidence as to the appellant's mental state was so compelling that the failure of appellant's counsel to offer evidence on this issue was not prejudicial. We reject this premise. If there is one area where expert witnesses are almost always diametrically opposed, it is the field of psychiatry. *See United States v. Neely,* 21 M.J. 606 (A.F.C.M.R. 1986); *United States v. Benedict, supra.* Doctor Coburn stated at the evidentiary hearing that the introduction of the "hit man" theoy did not alter his diagnosis.

We wish to make clear that we are not holding that a defense counsel *must* always offer evidence in his client's behalf. We know full well that many times the *best* trial tactic is to put the prosecution to its proof. Likewise, we also know that defense theories *can and must* be changed during a trial to fit changing conditions, and where there is a *reasoned plausible* basis for the decisions and tactics of counsel, we will not upset a conviction on a claim of inadequate representation.

However, the trial and evidentiary hearing transcripts in the case at hand force us to conclude there was a fatal breakdown in the adversarial process that our system counts on to produce just results. *Ewing v. Williams,* 596 F.2d 391 (9th Cir. 1979). Accordingly, this conviction cannot stand. In our decretal paragraph we will fashion a remedy.

III

The appellant asks that the charges be dismissed since a total of 210 calendar days had elapsed from the day he was placed in

pretrial confinement to date of trial. R.C.M. 707. In denying the motion to dismiss, the trial judge found that only 85 days of the total was accountable to the government. R.C.M. 707(c). We have examined the judge's findings of fact, the appropriate case law and the transcript. We find no basis to overturn his ruling denying the motion to dismiss.

IV

The findings of guilty and the sentence are set aside. A rehearing may be ordered.

Senior Judge FORAY and Judge MURDOCK concur.

APPENDIX C

U.S. AIR FORCE COURT OF MILITARY REVIEW

ACM 24758 (reh.)

UNITED STATES

v.

STAFF SERGEANT CLYDE E.L. MANSFIELD,
FR 048-44-1263 UNITED STATES AIR FORCE.

Sentence adjudged 9 Dec. 1987
Decided 21 Nov. 1991

Appellate Counsel for the Appellant: Major Paul M. Dankovich (argued), Colonel Richard F. O'Hair, and Colonel Jeffrey R. Owens.

Appellate Counsel for the United States: Lieutenant Colonel Brenda J. Hollis (argued), Colonel Joe R. Lamport, Colonel Robert E. Giovagnoni, Major Paul H. Blackwell, Jr., Major Morris D. Davis, Major Terry M. Petrie, and Captain James C. Sinwell.

Before MURDOCK, HODGSON and LEONARD, Appellate Military Judges.

OPINION OF THE COURT UPON REHEARING

HODGSON, Chief Judge:

On 4 February 1984, the body of Yang Chae-Song was discovered in an alley near the train station in Song-Tan, Korea. Yang had been fatally stabbed in the back. The city of Song-Tan borders the west side of Osan Air Base, a major American

military installation. The appellant, Staff Sergeant Clyde Mansfield, was convicted of Yang's premeditated murder in November 1984 and sentenced to life imprisonment and accessory punishments. On appellant's initial appeal we concluded he had been denied effective assistance of counsel, set aside the findings of guilty and the sentence, and authorized a rehearing. *United States v. Mansfield*, 24 M.J. 611 (A.F.C.M.R. 1987). At the second trial in December 1987, the appellant was again convicted of premeditated murder and sentenced to life imprisonment in addition to lesser penalties.

In March 1991 both sides completed their pleadings, and the 28 assigned errors ripened for consideration and resolution. We find no prejudicial error and affirm.

FACTS

During the summer of 1983, Mansfield was assigned to Hawes Air Force Station, California, as an electrical power plant technician. While he was not well-liked at the site, as he did not make friends easily, he was considered to be a competent non-commissioned officer. He was described by co-workers and associates as a "perfectionist" who was "meticulous and careful in his approach to problems." Once he decided on a course of action, it was difficult to dissuade him from following through.

The testimony at trial also established that the appellant was attracted to oriental women, and he actively sought their companionship. His first wife was Japanese, but the couple divorced after 10 years. He retained custody of their son.

Technical Sergeant Russell Haney worked with the appellant at Hawes AFS. He was married to a Korea, Un-Cha. Previously, Un-Cha had been married to the murder victim, Yang Chae-Song, but she divorced him and married Haney in 1982. Un-Cha and Yang had two children, Sabina and Michael, who came to the United States with Un-Cha.

Sometime in the late winter or early spring of 1983, the appellant asked Un-Cha to baby-sit his son. She agreed. This acquaintance later developed into a close relationship. The affair was an open secret at Hawes with the appellant speaking candidly of his love for Un-Cha. Haney became aware of the situation but was assured by Un-Cha that her relationship with Mansfield was not serious.

Myong-Cha Stein is Korean and during June 1983 lived with her husband, Technical Sergeant Richard Stein and their two daughters, Sandra and U-Sok, in an apartment near the train station in Song-Tan. Their landlord, Yang Chae-Song, had Myong-Cha call Un-Cha Haney and tell her that he, Yang, was seriously ill and would like to see his children before he died. This was not true. It was merely a scheme designed to allow Yang to get the children back in his custody. It was successful. Once the children were in Korea, Yang refused to let them return to the United States. Haney and Un-Cha went to Korea to locate them, but could not. Haney returned to the United States, but Un-Cha remained in Korea to continue the search.

Although she returned to the United States much earlier, Haney did not see Un-Cha again until September. There is an indication that Mansfield provided some of the money for the trip to Korea. The situation concerning the children upset Mansfield, and he told a co-worker, that he would "do whatever it took to get the children back." When Un-Cha said she lacked the funds to return to the United States, Mansfield sent her the money.

In July, after Un-Cha returned from Korea, she and Mansfield took a 12-day trip to Alaska to visit her sister, Eun-Hui Bending, whose husband was stationed there. It was apparent to Mrs. Bending that Mansfield was deeply in love with Un-Cha. It was during this period that Un-Cha believed she was in love with Mansfield.

Some that summer Un-Cha said she wished to undergo breast enlargement surgery. Mansfield arranged for the procedure and

agreed to pay for it. The two consulted a doctor in Las Vegas, Nevada. After being told there would be a 2-week convalescent period, Mansfield rented an apartment in Las Vegas for "Mrs. Un-Cha Mansfield." On 7 September, while the two were returning to Las Vegas for the operation, Un-Cha who was driving, lost control of the car. The resulting accident left Un-Cha permanently paralyzed from the waist down. Mansfield suffered only minor injuries.

Sergeant Haney first learned that Un-Cha had returned from Korea and was in the hospital when he received an ambulance bill for his wife in mid-September. When he went to Las Vegas to visit Un-Cha, Mansfield was there. Medical personnel at the hospital, and later at the rehabilitation center, initially thought Mansfield was Un-Cha's husband as he was always there with gifts. Un-Cha, however, was equally affectionate with both her husband and Mansfield.

After Un-Cha returned home to her husband's quarters on Edwards Air Force Base, Mansfield would drive by the Haney residence at all hours and leave notes for her in the bushes surrounding the house and under rocks. He would also hang around Haney's house and yard. This came to a head on 28 November, when a security policeman was summoned and found Mansfield crouched under the Haney's bedroom window. Mansfield told the investigating officer that he and Un-Cha were "good friends" and that he and Haney were "bitter enemies." In his attempt to have Un-Cha leave her husband and marry him, Mansfield had his sister call Un-Cha and pretend to be Haney's girl friend.

It was the consensus of Mansfield's co-workers that the accident deeply affected him. For example, he told all who would listen that he was "in love" with Un-Cha, wanted to marry her, and was responsible for her injuries. He also announced he thought Un-Cha's husband was mistreating her after the accident. It was, however, the "peeping Tom" inci-

dent that caused the deepest concern to Mansfield's site chief. The site chief, a senior non-commissioned officer, discussed the episode with Mansfield and ordered him, on 8 December, to refrain from contacting Mrs. Haney while she was married.

On 17 January 1984, the situation between Mansfield and Un-Cha Haney had reached a point that the site chief referred Mansfield to the Edwards Mental Health Clinic for evaluation. On 25 January 1984, Doctor (Col) Oscar Juarique, a psychiatrist and Chief of Mental Health at Edwards, interviewed Mansfield. He found Mansfield "agreeable, calm, relaxed and not overly depressed." Dr. Juarique concluded that while Mansfield had some problems, he was "fully responsible for . . . his actions." At this same general time, Mansfield went to the Edwards Housing Office, said he was going to get married, and that his fiancee was in a wheelchair and had two children. He inquired about modifying base quarters to accommodate her condition.

In early January 1984, Mansfield asked for 30 days leave to go to Korea "to rest and recuperate and to take care of some business [there]." Because of local manning requirements and because he was scheduled to be assigned to Korea, the leave was denied. Subsequently, Mansfield persuaded his site chief to give him 6 days leave beginning in late January to help his sister in Arizona move. The second leave application was submitted after his assignment to Korea was canceled.

Mansfield began his leave on 28 January. Before he left on leave, his immediate supervisor reminded him that he had to be back for duty on 2 February. A co-worker took him to the Los Angeles International Airport where he enplaned for Kimpo International Airport, Seoul, Korea. He arrived in Korea at approximately 1840, 29 January, Korea time.

Mansfield went from the airport to the Hamilton Hotel in Itaewon, a suburb of Seoul, Korea, where he stayed from 29 January to 3 February. While a guest at the hotel, Mansfield

struck up an acquaintance with the hotel manager and a bellman and would go to bars with them. During their conversations, Mansfield displayed a photo of a Korean woman in a wheelchair whom he said was his wife. Mansfield indicated his wife's ex-husband was the cause of her injury, and that he had come to Korea for "revenge." During his stay in Korea a number of phone calls were made between him and Un-Cha and between Un-Cha and the Stein/Yang residence in Song-Tan. He also called Un-Cha's sister in Alaska, but denied he was in Korea.

On 2 February, the owner of a rice store near the Song-Tan train station testified he saw an American fitting Mansfield's description making a phone call from a booth near his shop. He later identified Mansfield as the person making the call. During this same period, Mansfield made numerous phone calls to the Stein/Yang house asking for Yang. Although Mansfield used various false names, the persons taking the calls recognized the voice as his. Each time he called, mansfield said he had a letter or package for Yang. During the afternoon of 3 February, Sabina Haney, Un-Cha's 9-year-old daughter, saw Mansfield in an alley near their house, but he acted like he did not know her.

At about 1730 hours, 3 February, Yang answered the phone, looked bewildered, and handed the phone to Technical Sergeant Stein who was standing nearby. The caller, who spoke "very fluent English," told Stein his name was "Sergeant ?Wilson," and that he had a letter and package for Yang. He suggested that they meet at the Son-Tan Hotel Coffee Shop at 1900 that evening. Yang and Stein went to the hotel which was close by, but found no "Wilson." They both waited about an hour and left. When Stein arrived home early the next morning, Yang was not there. Yo Sum-Cha lives near the Song-Tan train station. At approximately 2115, 3 February, she heard an argument, partially in English, in the alley near her apartment. At the same time, Ho Non-Yi, who also lives nearby hearing running footsteps.

Mansfield caught a taxi at the Osan Air Base Main Gate at approximately 2130, 3 February, and had it take him to Seoul. He left Korea at about 1240, 4 February, Korean time, and arrived in Los Angeles at 1130, 4 February, California time. Later on 4 February, there was a disturbance when Mansfield attempted to pass a note to Un-Cha at the Edwards Base Theater. The security police were called, but the note was never found.

Yang's body was found in an alley near his house at approximately 0520, 4 February. He was fully clothed and wearing a leather jacket with a hole in the back. A stainless steel kitchen knife was lying near the body. The crime scene is three-quarters of a mile from the Osan Main Gate and near the Song-Tan Hotel and the train station. The autopsy established the cause of death as a single stab wound in the back which penetrated the ribs and severed the aorta. Death occurred almost immediately. The would was consistent with the knife found at the scene. The time of death could not be pinpointed, but was probably sometime between 2100 and 2200 hours, 3 February. There were no defensive wounds or injuries to the body, and no signs of a struggle.

Mansfield became a suspect almost immediately upon the discovery of Yang's body. On 4 April, he was arrested at Hawes and questioned. After proper warnings and advice as to the right to counsel, Mansfield acknowledged knowing Un-Cha and stated he loved her. He said he knew her children were the most important thing in her life, and she had told him she would never divorce her husband until she had her children. He admitted calling Un-Cha from Korea, but denied discussing the children during any of the calls.

Mansfield was returned to Korea in mid-April 1984, and placed in pretrial confinement. During this confinement he stated to a fellow prisoner, "I'm in this . . . place for a killing a . . . gook. I mean, they think I killed a . . . gook." After his first

trial, when asked by co-workers if he had killed Yang, he cryptically replied, "I'm not going to say I did, and wouldn't say I didn't." He indicated that such a response was necessary "because it's not over" and "there's a possibility there will be a round two." There is some evidence that Un-Cha suggested to Mansfield that if her first husband were dead, she would get the children back. Mansfield also indicated to the Korean wife of a co-worker that he was going to Korea to kill Yang so that Un-Cha could get her children back. This woman thought he was serious, and tried to talk him out of it.

Captain Mark *Paris* is the Chief Psychologist, Directorate of Mental Health, United States Disciplinary Barracks, Fort Leavenworth, Kansas. In mid-June 1985, Mansfield told Davis he want to Korea to bring back Un-Cha's children. He said he saw Yang and initially Yang agreed to return the children. The two met in a fairly populated area and then went through some winding streets and ended up in an area with no people around. There was a "verbal altercation." The next thing Mansfield remembered was seeing a man lying on the ground with a knife in him.

During their opening statement at Mansfield's second trial, the defense acknowledged that "although [the appellant] may have been the physical agent of the death of Mr. Yang, there is a serious doubt whether he was responsible [for] that death." The defense stressed that when Mansfield was in the alley with Yang, he was "a man who lacked the ability to conform his conduct to the requirements of the law."

To assist the court members in understanding what caused the appellant to act the way he did on 3 February 1984, the trial defense counsel offered extensive expert testimony from an array of highly qualified witnesses: Doctor John Beck, a psychiatrist with over 23 years experience; Doctor Robert Vosburg, a former Air Force Psychiatrist, now in private practice, who was a member of the sanity board that examined Mansfield in

1984; Doctor John Streffling, Chief of Psychiatry at the United States Disciplinary Barracks; and Doctor Michael Coburn, a forensic psychiatrist. While their views regarding specific diagnoses differed, they shared a common view on the forces that made the appellant behave as he did. They all agreed that while Mansfield could appreciate the criminality of his conduct, he lacked the substantial capacity to conform his conduct to the requirements of the law at the time of the offense.

Doctor Beck concluded that the appellant suffered from a Post-Traumatic Stress Disorder (PTSD), and Adjustment Disorder with Mixed Disturbance of Mood and Conduct, and a Mixed Personality Disorder which amounted to a mental disease or defect. Beck opined that in the 4 to 8 weeks before Yang's death, Mansfield was "in an altered state of personality function and personal desperation." The car accident of 3 September 1983 was the triggering event, and was a dual trauma: 1) injury to a loved one and 2) rejection of him by her in favor of her husband. The appellant "idealized" his relationship with Un-Cha. He saw her as the "personification" of sweetness and love. He rationalized that if he could get the children back, they could be used as pawns to get Un-Cha to leave her husband. Dr. Beck acknowledged that his diagnosis of the appellant's mental condition does not meet the American Psychiatric Association's (APA) definition of a severe mental disease or defect, but thinks their standard is too narrow and inflexible. In his view a severe mental disease or defect should not be limited to psychoses because other behavior disorders can be just as severe as any behavior compelled by a psychosis.

Doctor Vosburg first saw the appellant in May and June 1984. He was not sure why there had been a psychiatric referral as the appellant was "not flamboyantly psychotic" and "not grossly disturbed." At that time Vosburg found Mansfield oriented to time, place, circumstance, and in contact with reality. Later, he concluded that the appellant suffered from a PTSD

behavioral problem. The stressors included the car accident, problems at work, survival guilt as a result of the accident, and memory impairment. The accident triggered a "traumatic neurosis." The appellant's PTSD was described as mild to moderate and he was not psychotic. While he was deeply attracted to Un-Cha and looked upon her as a "mother surrogate," he was not obsessed with her in a clinical sense. *See American Psychiatric Institute, Diagnostic and Statistical Manual for Mental Disorders (DSM)* (3d Ed. 1980.) Dr. Vosburg agreed that a PTSD is not service-disqualifying, and that car accidents do not always result in PTSD.

Doctor Streffling has conducted over 6,000 mental examinations. He first saw the appellant in March 1985, when the latter had trouble sleeping and had contemplated suicide. After Streffling conducted two clinical evaluations and reviewed the prior mental health records, he diagnosed the appellant's mental condition as Alcohol Abuse in Remission, and a Mixed Personality Disorder with Paranoid, Schizoid, Schizotypal, Dependency and Obsessive Traits—he ruled out PTSD. He considered malingering as a possibility, but adhered to his opinion that the appellant lacked the substantial capacity to conform his conduct to the requirements of the law at the time of the offense.

Doctor Coburn interviewed the appellant four times—the last being in July, 1987. He found the appellant to be a "very sick" person whom he diagnozed as suffering from PTSD with a Mixed Personality Disorder manifested by Paranoid, Schizoid, Narcissistic, Avoidant, Dependent, and Obsessive-Compulsive traits. The car wreck that resulted in Un-Cha's injury and the earlier death of the appellant's mother were stressors that triggered the impairment which Coburn described as "very, very serious." Coburn acknowledged that the appellant did not have an organic brain disease and was not psychotic, but maintained that his mental condition was a disease or defect which pre-

vented him from conforming his actions to the requirements of the law. Dr. Coburn also thought the APA standard on what amounted to a mental disease or defect was too restrictive. He felt that the impairment should not have to be a psychosis, but merely a serious disorder. The appellant's stressors "snowballed" and, after the accident, he lost interest in everything and everyone but Un-Cha.

In preparation for his first trial, Mansfield wrote a lengthy and detailed account of his relationship with Un-Cha, the events that led up to the meeting with Yang, and what happened at that meeting. The parties at the second trial referred to this statement as ;the appellant's "life story." The statement told of Mansfield's attempt to hire a "hit man" to kill Yang, his purchase of a knife shortly before the homicide and the manner of its use at the scene. Both the defense and prosecution used the statement during the direct and cross-examination of the defense's expert witnesses, all of whom had read the statement and with the exception of Dr. Vosburg had considered it in arriving at a diagnosis.

The statement itself was a very difficult document for a psychiatrist to assess as it was a "combination of fact and fiction." Doctor Beck opined that even if the appellant had the knife in his hand when he met Yang, he lacked the ability to control himself. Doctor Vosburg's diagnosis of the appellant's mental state was not changed by his reading of the "life story." Likewise, Doctor Streffling's diagnosis remained the same after he read the statement. Doctor Coburn stated he was aware of the "hit man" theory the first day he met the appellant. He indicated further that the appellant had told him two versions of the events in Korea, but neither was complete or believable. Nothing in the "life story" changed his assessment of the appellant's mental makeup.

In his "life story" the appellant related that he attempted to negotiate the return of Un-Cha's children from Yang by offering

him a substantial sum of money. Initially, this offer was considered by Yang, but he changed his mind and started berating Un-Cha. The appellant and Yang argued, a scuffle followed, and the appellant took a knife from a plastic bag which Yang pulled from his hand. According to the appellant was happened next is unclear, but when he saw Yang on the ground, he attempted to remove any incriminating evidence from the scene and left.

The defense sought to show Yang as a violent person, skilled in martial arts, who had assaulted a former boyfriend of Un-Cha's with a knife. A professor of Korean Traditional Culture at the Seoul National University testified that offering money for a man's children is a "shameful thing," and would anger a Korean father. The defense suggested that when Mansfield offered to "buy" Un-Cha's children from Yang this so angered him that he attacked Mansfield who then was forced to defend himself. An instruction on self-defense was given the members prior to findings.

In rebuttal to the testimony just discussed the prosecution responded with three equally distinguished and qualified expert witnesses: Doctor Philip Resnick, a forensic psychiatrist who teaches courses on the detection of deception and faked mental illness; Major (Dr) Paul Sorgi, staff psychiatrist, and Director, Psychiatric Residency Training, Wright-Patterson Air Force Base, Ohio; and Colonel (Dr) Ali Baser, Chairman, Department of Psychiatry, Wiesbaden Regional Medical Center, Wiesbaden, Germany. Doctor Baser has 30 years experience as a psychiatrist.

All three psychiatrists who appeared for the prosecution testified that the appellant did not have PTSD, but at the very most a Mixed Personality Disorder which did not prevent him from conforming his conduct to the requirements of the law. None of these psychiatrists observed any evidence of a major mental illness, e.g., schizophrenia or manic-depressive state, or any indication of a psychosis. All three, using the American Law

Institute standard, found the appellant fully responsible for his actions.

Doctor Resnick cited various bases for concluding that the appellant had the capacity to conform his conduct to the requirements of the law and to refrain from stabbing Yang. For example, the appellant did not suffer from command hallucinations and there was no evidence that a delusion, delirium, psychosis or misperception of reality caused the act. Doctor Resnick observed that the appellant "did not act with an uncontrollable urge" and stab Yang in front of the coffee shop where he first met him, but waited until the two were in an isolated area and after Yang had refused to release Un-Cha's children in return for money. The appellant was only "driven" to kill Yang in order to please Un-Cha by getting her children back. In his opinion, the appellant was not an "out of control, quivering person welling up with hate," but a person who could control his actions until a time when he is less likely to be caught. Doctor Resnick acknowledged that Mansfield had an intense love for Un-Cha and spent substantial sums to win her affection, but stated that "being in love is not a mental disease."

Doctor Sorgi was a member of the sanity board that interviewed Mansfield in August 1987. At that time the appellant's behavior was appropriate, speech was in normal limits, and he possessed an above average I.Q. After reviewing the appellant's medical and prior mental evaluations, Doctor Sorgi found no evdience of a mental disease or defect. He concluded that the appellant had a mixed personality disorder, and had the capacity to conform his conduct to the requirements of the law. The basis for this conclusion was much the same as Doctor Resnick's in that Sorgi saw no hallucinations or delusions and no indication of a psychosis.

In September 1984, Doctor Baser was a member of a sanity board that evaluated the appellant. The board's conclusion indicated a mild to moderate Personality Disorder. There was

no evidence of PTSD. Doctor Baser pointed out that PTSD usually results in an impairment of the sexual drive, but Mansfield, in his "life story," stated he was sexually active in Korea, and had a "great time." Further, those suffering from PTSD avoid discussions of their traumatic events, however, here the appellant wanted to talk about the accident all the time. In Doctor Baser's opinion, Mansfield had the capacity to conform his conduct to the requirements of the law.

The prosecution also offered lay testimony that Mansfield appeared "normal, rational, and coherent" in his behavior up until his arrest. His mental stability was not questioned. Further, in June 1984, Mansfield told a cellmate he wanted to convince a psychiatrist he was "crazy." To this end he started acting "strange in the latrine" by staring at the walls. After the guard was called, Mansfield looked at his cellmate and "winked."

In closing its rebuttal case, the prosecution offered evidence that Yang was a peaceful, educated person who was not known to carry a knife.

INEFFECTIVE ASSISTANCE OF COUNSEL

The initial issue we address is one of first impression within the military justice system: Was the appellant denied his Sixth Amendment right to effective representation of counsel in his second trial because of a taint emanating from this Court's reversal of the results of his first trial? *Mansfield,* 24 M.J. 611 (A.F.C.M.R. 1987) (*Mansfield I*).

The main thrust of appellant's argument is that the prosecution, at his second trial, had access to, and probably used, privileged attorney-client information he was forced to disclose to support the claim of ineffective assistance of counsel at his first trial.

In the appeal following the first trial, the appellant claimed that his trial attorneys had failed to investigate, prepare, or properly present either an insanity or diminished capacity de-

fense. Later, his appellate counsel expanded the issue of ineffective assistance of counsel by suggesting that the trial defense counsel in *Mansfield I* acted improperly and against the appellant's best interests by instructing him to withhold material information from Doctor Coburn, a potential defense insanity defense witness. Both the government and the appellant asked for a limited evidentiary hearing to investigate the claim of ineffective representation. *See generally United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967). We ordered such a hearing. Our earlier decision in *Mansfield I* discussed the evidence supporting the appellant's allegation of inadequate representation.

A military accused is entitled to effective assistance of counsel. This is true whether the counsel is detailed or selected by the accused. *United States v. Scott*, 24 M.J. 186 (C.M.A. 1987); *Bates v. Blackburn*, 805 F.2d 569 (5th Cir. 1986). Further, where an accused is denied effective representation, he or she is entitled to a new trial. This is the rule in both military and civilian jurisdictions. *United States v. Scott, supra; United States v. Mansfield, supra; United States v. Cronic*, 839 F.2d 1401 (10th Cir. 1988); *Martin v. Rose*, 744 F.2d 1245 (6th Cir. 1984); *Morrison v. Kimmelman*, 650 F.Supp. 801 (D.C.N.J. 1986); *State v. Felton*, 110 Wis.2d 485, 329 N.W.2d 161 (1983).

The appellant, however, seeks dismissal of the charges as his remedy. Citing *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), he argues that he was "compelled" to waive the attorney-client privilege in order to establish grounds of ineffective assistance of counsel. Thus, he is entitled to a "*Kastigar*-like" remedy where in the prosecution has the affirmative duty to prove that the evidence it wishes to use at the second trial was derived from a legitimate source wholly independent of the "compelled" testimony relating to his claim of inadequate representation. He contends, without

this protection, "... [a] retrial becomes nothing more than a forum whereby the government perfects its case at the expense of the appellant's Sixth Amendment right to effective assistance of counsel." This assertion misses the mark. While the appellant's self-interest may "compel" him to claim that his lawyer was inept, this "compulsion" does not allow him to re-claim his attorney-client privilege. An attack on an attorney's competence waives the attorney-client privilege as to matters reasonably related to the claim of inadequate representation. *United States v. Johnson*, 21 M.J. 211 (C.M.A. 1986); *United States v. Caudill*, 18 M.J. 514 (A.F.C.M.R. 1984); *see also* Mil.R.Evid. 502(d)(3).

Appellant's counsel maintain that "[t]he unique circumstances of this case have conspired to produce a situation wherein he can never receive a fair trial." They postulate that the appellant can never be restored to the position he occupied before the ineffective representation. They argue that the evidentiary hearing which provided the basis for granting a new trial gave the prosecution unfair access to facts and potential defenses that the appellant might raise at the hearing. Accordingly, they urge that dismissal of the murder conviction is the only just remedy.

To arrive at this conclusion, appellate counsel treat the appellant's situation as a two-act play where the scenes in the first act are so important that the play can never be revised to arrive at a different ending before the final curtain. We, on the other hand, view the circumstances as two one-act dramas that, while tangentially connected, need not reach the same conclusion.

Stated briefly, it is the appellant's position that his lawyers in the first trial so botched his defense that his lawyers in the second trial were prevented from adequately defending him. In their view the two trials are linked, and the trial tactics in the first which resulted in a rehearing had a prejudicial impact on the second.

For example, the appellant claims he was precluded from testifyin the second trial because of the "Life Story" his lawyers on his first trial had him prepare and give to potential defense psychiatric witnesses. Few decisions made during the course of a litigated trial are risk-free. Whether an accused takes the stand in a trial is a tactical decision where the danger of doing so is weighted against the benefit. Mansfield's decision whether to testify may not have been easy, but the choice was there. *See State v. Lucas,* 164 Ariz. 540, 794 P.2d 1353 (App. 1990). The appellant did not take the stand at the rehearing. However, there could be any number of appropriate reasons, not related to the first trial, as to why the appellant did not testify. We need not speculate about them. *United States v. Hurt,* 9 U.S.C.M.A. 735, 27 C.M.R. 3 (1958); *See United States v. Small,* 48 C.M.R. 170 (A.F.C.M.R. 1974).

Appellant's counsel also argue that the delay between the first and second trial prevented the appellant from obtaining additional psychiatric testimony. The record does not support this assertion. In addition to the psychiatrists who were potential defense witnesses at the first trial, the defense called expert witnesses who based their testimony solely on examinations of the appellant conducted subsequent to the first trial. There is no showing that passage of time between the two trials blotted out a substantial defense. *Accord People v. Corona,* 80 Cal.App.3d 684, 145 Cal.Rptr. 894 (1978) (New trial ordered after a 7 year lapse because an insanity defense was available, but not raised. Accused initially convicted of killing 25 migratory workers.)

Any rehearing can limit trial tactics. For example, an accused would be hard pressed to claim alibi in a second trial having relied on self-defense in the first. Likewise, any retrial permits the prosecution some insight into the likely strategy the accused will follow. There are several situations where an accused must disclose certain defenses before they can be asserted. The government must be informed whenever alibi is to be raised as a

defense. R.C.M. 701(b)(1). If insanity is an issue, the prosecution is to be told. R.C.M. 701(b)(2). An accused may be examined by government psychiatrists where insanity is raised. *United States v. Parker,* 15 M.J. 146 (C.M.A. 1983); *United States v. Babbidge,* 18 U.S.C.M.A. 327, 40 C.M.R. 39 (C.M.A. 1969).

The appellant's two trials are not a continuum, but are separate and distinct hearings. The proper test is whether the lawyers at the appellant's second trial adequately defended him. *See Herman v. Butterworth,* 744 F.Supp. 1128 (S.D.Fla. 1989). We find that they did. The appellant is not entitled to a risk-free rehearing, but to a fair trial. His lawyers at the second trial were aggressive, innovative, and skillful. They used the available defense evidence to great potential advantage. That they were not successful does not detract from the quality of their representation. At the appellant's second trial, his Sixth Amendment right to effective representation was safeguarded to the fullest.

Appellate defense counsel seek to make the appellant's lawyers at the first trial surrogate counsel at the second. We decline to expand the law in this manner.

ADMISSION OF "LIFE STORY"

As stated earlier the appellant, in preparation for his first trial, wrote a lengthy and detailed account of his relationship with Un-Cha and the events that led up to his meeting with Yang and what occurred during that meeting. This "Life Story" contained incriminatory statements by the appellant regarding Yang's death. At the second trial, this statement was used by the defense in direct examination of expert witnesses, Doctors Vosburg, Strefling, and Coburn, all of whom testified the appellant lacked the substantial capacity to conform his conduct to the requirements of the law at the time of the offense.

In rebuttal, the prosecution offered the entire statement as evidence tending to show that the appellant killed Yang. They

argued that since the defense based a sizable portion of its direct examination of expert witnesses on information contained in the document, the members were entitled to consider the entire statement. *See* Mil.R.Evid. 801(d)(2); *see generally United States v. Lonetree*, 31 M.J. 849 (N.M.C.M.R. 1990). They also urged that the statement was clearly voluntary within the meaning of Mil.R.Evid. 304. The trial judge admitted the statement.

Evidence that is not admissible in the prosecution's case-in-chief may become so by the tactics used by the defense. The military judge has broad discretion as to what evidence is to be admitted or excluded in rebuttal. *United States v. Rodriguez*, 28 M.J. 1016 (A.F.C.M.R. 1989), *aff'd* 31 M.J. 150 (C.M.A. 1990).

The appellant challenges his statement's admissibility on two grounds: 1) His expert witnesses only "considered" the statement but did not "rely" on it arriving at a conclusion as to his mental state; and 2) No foundation was established for its admission.

As to the first objection, appellate counsel are arguing semantics. It is clear that defense psychiatrists used the statement in reaching a diagnosis. Regarding the second objection, the trial defense counsel stated numerous times during direct examination of defense witnesses that Mansfield wrote the statement. Defense witnesses also testified they were given the statement by the appellant's counsel. Further, Mansfield acknowledged to at least two psychiatrists that he wrote the account. Finally, the document itself contains information that only the appellant would know. All of these factors are strong circumstantial evidence of the document's authenticity. *Accord United States v. Cook*, 794 F.2d 561 (10th Cir. 1986).

However, we need not decide this issue solely on the objections raised by trial defense counsel and assertion to us by appellate counsel. Assuming, *arguendo*, that the trial judge erred in admitting the statement, we see no prejudice to the

appellant. The question of who killed Yang was not contested by the defense trial team. In their opening statement, and before the challenged statement was admitted, the defense conceded that the appellant killed the victim. Further, various defense witnesses (psychiatrists) were told to assume that the appellant caused Yang's death. Under these circumstances it is difficult to hold that the admission of the appellant's "Life Story" resulted in prejudicial error.

DENIAL OF MISTRIAL MOTION

During the government's rebuttal, Doctor Baser, a sanity board member, testified that the appellant was mentally responsible at the time of the offense. Doctor Baser stated that he had read and considered the appellant's "Life Story" in reaching a conclusion as to his mental state. When asked by the trial counsel if he knew why Mansfield's narrative was created, he replied:

> My understanding is that there was another document. In the course of my evaluation, the accused handed me *a long handwritten document of his confession*, as well as his description of the circumstances (emphasis added).

This answer is non-responsive and the witness inadvertently referred to a document not under discussion. Defense counsel objected to the answer and requested a mistrial maintaining that the disclosure created an impression that the witness had personal knowledge about the appellant's "Life Story," and the existence of a second document. Further, the court-members would expect answers to matters that could not be appropriately answered.

The trial judge denied the appellant's mistrial motion, and gave the following instruction:

> Members of the court, . . . I want to give you an instruction. The witness referred to some sort of confession or admission handed to him by the accused at the time of the original sanity evaluation by this witness' sanity board.
>
> The court is instructed that nothing that was given to the witness during the interviews by this witness constituted a confession by the accused, and no inference to that effect should be drawn from the statement by this witness.

The defense considered the instruction inadequate, and claimed the error was "irremediable".

The decision to declare a mistrial rests within the sound discretion of the trial judge. The preferred remedy for curing error caused by members hearing inadmissible evidence is a curative instruction, so long as the curative instruction avoids prejudice to the accused. *United States v. Evans*, 27 M.J. 34 (C.M.A. 1988), *cert. denied* 488 U.S. 1011, 109 S.Ct. 797, 102 L.Ed.2d 788 (1989); *United States v. Rebuck*, 16 M.J. 555 (A.F.C.M.R. 1988), *pet. denied* 17 M.J. 52 (C.M.A. 1984). Any error brought about by Doctor Baser's nonresponsive answer was harmless in light of the defense evidence already before the court. *Accord United States v. Bledsoe*, 26 M.J. 97 (C.M.A. 1988). The members were aware of the "Life Story" through the testimony of numberous defense witnesses. Further, while the term "confession" denotes a high degree of culpability, the defense had earlier conceded that the appellant had caused the victim's death. These circumstances, plus the curative instruction, convince us that the trial judge did not abuse his discretion in denying the mistrial motion.

KNOWLEDGE OF PRIOR TRIAL

At the government's request, the trial judge gave the following cautionary instruction at the beginning of the trial:

> The accused has been tried before. You should not concern yourself with this fact. Your verdict must be based solely on the evidence in the present trial, in accordance with the court's instructions.

This instruction was taken verbatim from the pattern instruction guide for federal judges. *See* Devitt & Blackmar, *Federal Jury Practice & Instructions,* section 10.04, (3d ed. 1984).

Appellate defense counsel argue that this instruction together with the trial judge allowing the prosecution to call witnesses whose testimony directly or inferentially established that the appellant had previously been convicted of the same charge, denied the appellant a fair trial. They claim that the judge's actions effectively diluted the presumption of innocence to which every accused is entitled.

We find no fault with the challenged instruction. *United States v. Hykel,* 461 F.2d 721 (3d Cir. 1972); *Carsey v. United States,* 392 F.2d 810 (D.C.Cir. 1967). The government is not limited in the second trial to the evidence that was presented in the first, but may offer any admissible evidence that will strength its case. *United States v. Gallagher,* 602 F.2d 1139 (3d Cir. 1979); *United States v. Shotwell Manufacturing Co.,* 355 U.S. 233, 78 S.Ct. 245, 2 L.Ed.2d 234 (1957). It is not uncommon during a rehearing for a reference to be made to the previous trial. The instruction that was given accepted that this was likely, and sought to meet the problem head on. Court members are presumed to follow the instructions of the trial judge. *See United States v. Moreno,* 10 U.S.C.M.A. 406, 27 C.M.R. 480 (1959).

APPELLANT'S VERACITY

In rebuttal, Doctor Resnick testified that studies have indicated that psychiatrists are no better than lay persons in determining when someone is telling the truth. He did state, however,

that identifying faked mental illnesses was an area of special interest to him, and he had taught courses on the subject. With this background, the trial counsel asked the following question:

> Q: Sir, have you formed an opinion in this case as to the accused's veracity?
>
> A: Yes, I have.
>
> Q: And what is that, Sir.

Before the question was answered, the trial defense counsel objected, made a motion for mistrial and, in an out-of-court hearing, contended the government was attempting to use Dr. Resnick as a "truth telling machine." *See generally United States v. Clark*, 12 M.J. 978 (A.F.C.M.R. 1982), *pet. denied* 13 M.J. 480 (C.M.A. 1982). The trial judge sustained the objection but denied the mistrial motion.

Initially, the defense opposed giving a curative instruction, but subsequently agreed that "it may be less hurtful to give an instruction than to not give an instruction." Thereafter, the trial judge gave the following instruction:

> Mr. President and members of the court, I want to instruct the court that it is solely the purview of you members of the court to determine the veracity of evidence brought before you and other matters called to your attention.
>
> No witness, whether an expert or not is qualified to determine as a matter of expertise or experience whether someone is or is not telling the truth. All they can do is express an opinion as to whether they think a person is or is not responding truthfully.
>
> You and you alone must make the final determination of whether or not a witness or a party is to be believed.

Appellate defense counsel claim that the "error was such that it was beyond fixing," and the above instruction only made it worse. Thus, they contend the trial judge erred in not granting the mistrial.

In evaluating the judge's ruling it must be remembered that the question was never answered. Further, the thrust of the question was toward the witnesses' expertise in identifying persons who feign mental illnesses, and not toward the appellant's general truthfulness. Later in the trial, the government offered evidence suggesting that the appellant had attempted to fake a mental illness.

As we stated earlier, the decision to grant a mistrial lies with the sound discretion of the trial judge. Here he did not abuse that discretion, and his curative instruction was the proper remedy. *Evans*, 27 M.J. at 39.

JURISDICTION

The appellant argues on appeal as he did at trial that the Air Force lacks jurisdiction over him or the offense. He claims he was in Korea "... solely on a private matter, traveling on a tourist passport." He was, according to him, "a private citizen on a private errand." Thus, there was no official connection between himself, the victim, and the United States. Under these circumstances, he contends he is a private citizen and cannot be "prosecuted by any arm of the United States" for an offense taking place in a foreign country.

This assigned error need not detain us long. In *Solorio v. United States*, 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987), the Supreme Court held that court-martial jurisdiction rests on the military status of the offender and not on the nature of the offense. Even under pre-*Solorio* precedents, court-martial jurisdiction has been upheld over a servicemember who committed a crime in a foreign country where he was not stationed, but was visiting in an authorized absence status. *See*

e.g., United States v. Newvine, 23 U.S.C.M.A. 208, 48 C.M.R. 960 (1974). The assigned error is without merit.

MANDATORY SENTENCE

Appellate counsel argue that a mandatory life sentence for premeditated murder is invalid because the element of premeditation is unconstitutionally vague. They argue that since the premeditation aspect of a killing can be met in the "flicker of an instant," the government can define premeditation in an unfettered and unrestrained fashion when trying to prove any homicide offense. This, according to appellate counsel, "is the ultimate manifestation of prosecutorial whom."

Appellate counsel contend that the original charges against the appellant did not support a charge of premeditated murder because, as the advice of the Staff Judge Advocate acknowledged "there were no witnesses to the stabbing and . . . no forensic evidence linking the accused to the knife or the brutal killing." The vague definition of premeditation was therefore not enough to charge the appellant with premeditated murder with a mandatory sentence of life imprisonment upon conviction.

"Premeditation" is a term of art commonly employed and universally understood in the law of homicide. The military definition states:

> PREMEDITATION: A murder is not premeditated unless the thought of taking life was consciously conceived and the act or omission by which it was taken was intended. Premeditated murder is murder committed after the formation of a specific intent to kill someone and consideration of the act intended. *It is not necessary that the intention to kill have been entertained for any particular or considerable length of time. When a fixed purpose to kill has been delib-*

> *erately formed, it is immaterial how soon afterwards it is put into execution.* The existence of premeditation may be inferred from the circumstances (emphasis added).

MCM 1984, Part IV, para 43c(2)(a). The military definition of "premeditation," with minor variations as to the language, is the same as that in civilian courts. *See generally Davis v. Wyrick,* 766 F.2d 1197 (8th Cir. 1985); *United States v. Chagra,* 638 F.Supp. 1389 (W.D.Tex. 1986), *aff'd* 807 F.2d 398 (5th Cir. 1986); *cert. denied* 484 U.S. 832, 108 S.Ct. 106, 98 L.Ed.2d 66 (1988); *Hounshell v. State,* 61 Md.App. 381, 486 A.2d 798 (1985).

The concept of challenging a penal statute for "vagueness" rests on the constitutional principle that procedural due process requires fair notice and a proper standard for adjudication. *Landry v. Daley,* 280 F.Supp. 938 (N.D.Ill. 1968). Criminal statutes are presumed constitutionally valid, and the party attacking the constitutionality of a statute has the burden of proving otherwise. *See People v. Revello,* 735 P.2d 487 (Colo. 1987). Here, appellate counsel offer only a generalized claim that the element of premeditation is "unconstitutionally vague"—they offer no authority and little discussion to support the assigned error.

The "vagueness" test is not an exercise in semantics, but a pragmatic test to ensure fairness. The military case law as to what constitutes "premeditation," and what that term means, is so well-established that it prevents discriminatory enforcement by the government, the trial court, and the factfinders. *See United States v. Teeter,* 16 M.J. 68 (C.M.A. 1983); *United States v. Matthews,* 16 M.J. 354 (C.M.A. 1983); *United States v. Gay,* 16 M.J. 104 (C.M.A. 1984). We reject the appellant's claim that the element of premeditation as defined by military law is unconstitutionally vague. *Accord United States v. Cooper,* 754 F.Supp. 617 (N.D.Ill. 1990).

LEADING QUESTIONS

Appellate counsel claim that Mansfield was denied a fair trial because the trial judge refused to permit trial defense counsel to ask leading questions of Myong-Cha Stein on direct examination. The victim was the Stein family's landlord, and he lived in the same house with them. Mrs. Stein had been, at one time, intimately involved with him. The appellant argues that Myong-Cha Stein was an adverse witness and the trial judge's ruling effectively denied him the ability to develop a defense of self-defense.[1]

Leading questions may be defined as those which suggest to the witness the desired answer, or which assume to be proved a fact which is not proved, or which by stating a material fact, permit an answer by a simple yes or no. The general rule is that counsel, with the exception of adverse witnesses, may not ask leading questions on direct examination of a witness. However, the rule and the exception are not absolute, and it is within the sound discretion of the trial judge to permit such questions. Mil.R.Evid. 611(c); *Ellis v. Chicago,* 667 F.2d 606 (7th Cir. 1981); *United States v. O'Brien*, 618 F.2d 1234 (7th Cir. 1980).

Appellate counsel assert that Mrs. Stein was called to establish that Yang loved his children, was contemptuous of Un-Cha Haney, had violent propensities, and was insulted about the appellant's attempt to return his children to Un-Cha. All of this was supposedly in support of the defense theory of self-defense.

In almost 20 pages of direct examination only three trial counsel leading question objections were sustained. Further, it doesn't appear that these sustained objections hampered the defense's ability to elicit the desired testimony from Mrs. Stein. Mrs. Stein's testimony established those facts the defense wished to establish concerning the appellant's self-defense theory. We hold the trial judge did not abuse his discretion.

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[1] It was uncontested at trial that the victim died as the result of a single stab wound in the back.

PRIOR TESTIMONY

The appellant claims that the trial judge erred in admitting, at his second trial over defense objection, the former testimony of Sim Sang-Kuk and Yi Chong-Kwan which was taken at his first trial. In support of this claimed error, appellate defense counsel remind us that Mansfield was granted a new trial because he was denied effective representation at his first trial.

We agree that the trial judge erred. Before testimony taken at a prior trial can be used, there is a requirement the accused be adequately represented at the former trial. *United States v. Vanderpool,* 15 C.M.R. 609 (A.F.B.R. 1953). On certification of a similar issue by The Judge Advocate General of the Air Force to the Court of Military Appeals, Judge Brosman, wrote:

> [I]t would be inconsistent for us to agree that the accused was somehow denied adequate legal representation at the first trial and yet hold the testimony given at that proceeding to be admissible to ground a conviction at the second over the objection of the accused. On the contrary, we think that there is no logical escape from the conclusion that the former testimony . . . was inadmissible, and that the objection by the defense to its introduction would have been well taken.

United States v. Vanderpool, 4 U.S.C.M.A. 561, 567, 16 C.M.R. 135, 141 (1954).

We have examined the record to see if the appellant was harmed. Sim Sang-Kuk is a bellman at the Hamilton Hotel. His former testimony established that he and Mansfield became drinking companions. During the course of their acquaintance, the appellant indicated to Sim that his "wife" was in a wheelchair, and her ex-husband was the reason for her condition. The appellant stated he was in Korea to get "revent" against the ex-husband.

All of Sim's former testimony was before the court through the testimony of other witnesses. Additionally, some of Sim's testimony supported the defense theory that the appellant was not mentally responsible at the time of the offense. For example, Sim stated, at times, he thought the appellant acted like an "insane person."

Yi Chong-Kwan owns a rice store near the Song-Tan train station. He testified he saw an American fitting the appellant's description making a phone call from a booth near his shop. His testimony established that the appellant was in the area where Yang's body was found before the killing took place.

The same fact was also established by other witnesses in appellant second trial. Un-Cha's daughter, Sabina, testified she saw the appellant in the alley near Yang's house, and the appellant acted as if he did not know her. Further, Un-Cha's son, Michael, recognized the appellant's voice when he called the Stein residence and asked for Yang. Both incidents involving Un-Cha's children occurred a few hours before Yang was found dead.

Further, the defense did not deny that the appellant was in the alley with Yang and was ". . . the physical agent of the death of Mr. Yang." They acknowledged that in their opening statement. They defended on the appellant's lack of mental responsibility at the time of the offense and he had acted in self-defense when he killed Yang. The defense stipulated that the appellant met Yang in the alley on 3 February 1984 sometime between 2100 and 2200.

We are convinced that the erroneous admission of the prior testimony of these two witnesses was harmless error as there is other competent evidence of record by other witnesses establishing the same facts. Accordingly, it was collateral and cumulative information that had no reasonable impact on the court. *United States v. Quigley*, 44 C.M.R. 718 (N.B.R. 1971); *See United States v. Finch*, 22 C.M.R. 698 (N.B.R. 1956).

PARTIAL MENTAL RESPONSIBILITY

Prior to argument on findings, the trial judge, without objection by the defense, gave the members the pattern instruction on partial mental responsibility found in Department of the Army Pamphlet 27-9 (Feb 85), *Military Judges' Benchbook*, paragraph 6-5. *See also Ellis v. Jacob*, 26 M.J. 90 (C.M.A. 1988).

On appeal appellate counsel claim the unchallenged instruction was flawed in that it "omitted any reference to the fact that the accused may have been sane." In their view, this omission may have allowed the members to conclude that the defenses of mental responsibility and partial mental responsibility were mutually exclusive.

We disagree and hold that the instruction given by the trial judge correctly states the law in this area. *See generally United States v. Tarver*, 29 M.J. 605 (A.C.M.R. 1989).

SELF-DEFENSE EVIDENCE

Appellate defense maintain that the trial judge denied the appellant his right to assert self-defense effectively by excluding "alley" references in the video deposition of Kong Su-Chim. The appellant sought to establish that the victim, Yang, was a violent man by offering evidence that Yang had attacked Kong with a knife in an "alley." Thus, there was a parallel between Yang's earlier use of a knife, and the altercation involving the appellant.

The record does not support the appellant's claim of error. Using leading questions on direct examination, trial defense counsel sought to have Kong admit that Yang had cut him on the ear with a knife in an "alley." Kong resisted defense counsel's urging that the attack took place in a "dark alley." Instead, he insisted the assault happened in a yard outside a tea room after both had been drinking. The incident apparently occurred sometime in early 1974. While Kong did not agree with defense

counsel's suggestion that an "alley" was the locale of the assault, he did acknowledge that Yang was a violent person who would use a knife when provoked. This evidence supported the defense theory of self-defense. The trial judge did not abuse his discretion by deleting the additional "alley" references.

STIPULATIONS

Appellate defense counsel argue the trial judge erred by failing to explain to the appellant the meaning and effect of three stipulations of fact and expected testimony. *See* R.C.M. 911(c); *see United States v. Cambridge*, 3 U.S.C.M.A. 377, 12 C.M.R. 133 (1953). The written brief on this assigned error devotes itself almost entirely to the premise that the stipulations agreed to by the appellant, trial defense counsel, and the prosecution were confusing to the court and should not have been admitted.

The three stipulations complained of were literally the last bit of evidence presented in this trial of almost five months. Each stipulation began with the preamble that the facts or testimony contained in the document was "stipulated and agreed [to] by and between the trial counsel and defense counsel with the express consent of the accused." All in all, 17 stipulations were offered by the parties and admitted into evidence. In the last three the trial judge did not question the appellant as required by *Cambridge*.

This oversight did not prejudice the appellant. Where the stipulation is strictly procedural, or where, as here, the appellant has previously been advised about the same type of stipulation, the advice may be *curtailed or omitted*, in the judge's discretion. *United States v. Gonzalez*, 14 M.J. 501, 505 n. 8 (A.F.C.M.R. 1982) (emphasis added).

We conclude the trial court did not err in admitting stipulations agreed to by all parties even though appellate counsel now considers them confusing and not helpful to the members.

TEMPORARY ABSENCE OF LEAD COUNSEL

Appellate defense counsel argue that it was to the appellant's "substantial detriment" that during the initial Article 39(a) session the appellant was represented only by the assistant defense counsel and not the lead counsel.

in the out-of-court session on 29 June 1987, appellant specifically waived his lead counsel's presence. Additionally, the record indicates the appellant knew why lead counsel was unable to attend that 2 hour portion of the proceedings.

R.C.M. 805(c) states "As long as at least one qualified counsel for each party is present, other counsel for each party may be absent from a court-martial session." Thus, no error was created by the absence of lead counsel, and even assuming error, it was neither jurisdictional nor prejudicial. Further, appellate defense counsel has not directed our attention to any failure on the part of the assistant defense counsel to take any necessary action on behalf of the appellant. *United States v. Batts*, 3 M.J. 440 (C.M.A. 1977).

IMPROPER REBUTTAL AND CONSCIOUSNESS OF GUILT

Appellate defense contend the trial judge erred when he allowed the prosecution to show that Mansfield had made 114 requests to use the law library at the United States Disciplinary Barracks (USDB). Citing *Bounds v. Smith*, 430 U.S. 817 (1977), the defense claims that since prisoners have a constitutional right of access to courts, the prosecution sought to penalize the appellant for exercising his right to use the law library. Appellate counsel analogize the evidence as commenting on an accused's right to plead not guilty or not to testify.

On the other hand, the government argued at trial that the testimony and documentary evidence was relevant as it explained how the appellant was able to educate himself on the defense of lack of mental responsibility.

To be admissible, evidence must be relevant and not too remote in time so as to be probative. Mil.R.Evid. 401; *see also United States v. Teeter*, 16 M.J. 68 (1983). We are aware, of course, of the trial judge's broad discretion in admitting or excluding evidence under Mil.R.Evid. 403. *See United States v. Jackson*, 22 M.J. 604 (A.C.M.R. 1986). However, here we conclude the trial court abused its discretion in admitting the appellant's many requests to use the law library. The possibility that the appellant may have used such visits to manufacture a defense is too remote to justify its admission as rebuttal evidence.

While we find error, our examination of the record convinces us that the prejudicial impact of this evidence is nil. Two defense psychiatrists first broached this subject on direct and cross-examination. There was no objection by the defense at this time. Thus, the members were already aware of the appellant's use of the law library before the government offered more extensive evidence in rebuttal. Further, all aspects of the appellant's mental state were testified to by expert witnesses on both sides, and the ability of a patient to fabricate a mental disorder had already been discussed.

In a related assigned error, appellate defense counsel maintain the trial judge erred when he admitted evidence offered as "consciousness of guilt." The testimony is of Technical Sergeant Smith, a friend of the appellant, who, after the first trial and through idle curiosity, asked the appellant if he had committed the offense. According to Smith, the appellant responded, "I can't say yes, and I can't say no, because there is going to be a round two."

Trial defense counsel's only objection was to the second half of the statement, "because there is going to be a round two." The defense contended that this testimony unnecessarily referenced the earlier trial and penalized the appellant for exercising his appellate rights. Thus, it posed the danger of "unfair preju-

dice, confusion of issues, and the risk of misleading the court-members."

Admitting evidence tending to show the accused's consciousness of guilt is an accepted principle of military jurisprudence. *United States v. Borland*, 12 M.J. 855 (A.F.C.M.R. 1981). It is within the trial judge's discretion whether to admit evidence offered as consciousness of guilt. Here, the judge erred in admitting such evidence. The appellant's statement in its entirety was so ambiguous that it could hardly be construed to show consciousness of guilt. At most it was the equivalent of saying "no comment." The reference to "round two" was innocuous because the hearing in which the statement was repeated was the "round two," i.e., a new trial.

Even though the testimony should have been ruled inadmissible, the impact, if any, was minor. The very ambiguity of the statement makes it unlikely the court-members attached any significance to it. Further, there was no reference to it by trial counsel in the final argument. The admission of the evidence was harmless error. *United States v. Peel*, 29 M.J. 235 (C.M.A. (1989)), *cert. denied*, 493 U.S. 1025, 110 S.Ct. 731, 107 L.Ed.2d 750 (1990).

UNCHARGED MISCONDUCT

The appellant's sister testified for the defense. On cross-examination she stated that the appellant visited her in Arizona while she was in the hospital and that the appellant, while still on leave, then went to California for a short time.

Trial defense counsel objected to this disclosure on the basis of relevancy and that it was evidence of uncharged misconduct. Addressing the second ground first, this is not a situation involving uncharged misconduct. The Leave Request/Authorization Form does not require a military member to be at the leave address. He only must be able to be contacted at that leave address. *See* Form 988, Aug 86, *Leave Request/Authorization*,

Part II, Section II, Item 6. Here the appellant, while in California, called his supervisor and gave him the phone number where he could be reached. Thus, the appellant was in full compliance with the governing regulation.

The trial judge initially agreed that the prosecution's argument that the appellant's actions in going to California indicated "manipulative behavior" was "stretching relevancy" to the limit. Accordingly, he sustained the defense objection. Later, he reversed himself, and admitted the evidence.

The trial judge should have adhered to his original ruling. We find it difficult to accept the prosecution's argument at trial that the appellant manipulated his sister's operation for the purpose of going to California, that such behavior is typical for the appellant, and that is relevant. Appellate government counsel expand this argument by claiming that "the evidence of the appellant's leave to visit his sister in Arizona is relevant because it supports [its] theory concerning mental responsibility by showing the appellant is the type of person who uses people and situations for his own ends." We also have difficulty accepting this basis for admission of the evidence. We hold the admitted evidence did not meet the relevancy test, and the trial judge erred by admitting it.

Having determined that, we conclude that admission of the evidence was harmless error. The appellant's claim that he was not mentally responsible at the time of the offense was examined on all sides by expert witnesses. The likelihood that the members were prejudicially influenced by the fact that, while on leave in Arizona, the appellant also went to California for a short time is minimal.

VOIR DIRE

Appellate defense counsel claim the appellant was denied due process of law when the trial judge, over defense objection, questioned the members during *voir dire* on an insanity defense that was not necessarily going to be raised.

This assigned error borders on the frivolous for several reasons. First, even a casual reading of our decision in *Mansfield I* would suggest that an insanity defense would be the key issue at any new trial. Trial defense counsel recognized this. As early as 5 June 1987, they requested the employment of three civilian psychiatrists, and in that request stated they expected that the lack of mental responsibility would be a major issue in the trial. The allied papers in this record are replete with correspondence from the defense, before the trial began, requesting the prosecution to arrange compensation and travel for the defense psychiatrists. These circumstances belie the appellant's later claim that "an insanity defense was not necessarily going to be raised."

Second, this court, and the Court of Military Appeals, along with other federal appellate courts, have long held that a trial judge is allowed the widest possible latitude in the manner and extent of the questioning on *voir dire*. *United States v. Robinson*, 475 F.2d 376 (D.C.Cir. 1973); *United States v. Smith*, 27 M.J. 25 (C.M.A. 1988); *United States v. Freeman*, 15 U.S.C.M.A. 126, 35 C.M.R. 98 (1964); *United States v. Nixon*, 30 M.J. 501 (A.F.C.M.R. 1989); *pet. denied* 31 M.J. 435 (C.M.A. 1990); *see also* Fed.R.Crim.P. 24(a).

Third, as we stated in *Nixon*, the main purpose of a *voir dire* is to uncover information so that challenges can be wisely exercised. As a result of the trial judge's questioning, seven members disclosed varying degrees of knowledge in the fields of psychiatry and psychology. One member, later challenged by both the government and the defense, held a very low opinion of psychiatry and psychiatrists. Another member, also challenged by both sides, lacked only a thesis for a masters degree in psychology. This member was also well acquainted with DSM-III. The record clearly establishes that the questions asked by the trial judge resulted in useful information which the parties used in exercising both peremptory and challenges for cause.

Finally, the appellant has not shown he was prejudiced in any manner by the judge's *voir dire* questioning—to the contrary,

he was materially assisted by the judge's actions. The insanity issue was the major issue in the case, and it was appropriate for the trial court to raise this subject during *voir dire*. This assigned error is without merit.

SPEEDY TRIAL

A total of 193 calendar days elapsed from 24 April 1987, the day this court set aside the appellant's murder conviction, and 2 November 1987, the first day that evidence went before the members. *See* R.C.M. 707(b)(3)(B).

In denying the appellant's motion to dismiss, the trial judge found that only 78 days of the total was accountable to the government through 28 September 1987, the date the appellant raised the speedy trial motion. The appellant claims the trial judge erred in calculating the number of days attributable to the government for speedy trial purposes under R.C.M. 707. He contends the speedy trial clock should have started on 24 April 1987, the day we set aside his conviction and not 13 May 1987, the date the trial judge concluded "the convening authority was notified of the final decision authorizing a rehearing." This period amounted to 18 days. Additionally, the appellant contends the government is accountable for 23 days it needed to complete the "mental examination process." Appellate defense counsel imply that the examination could have been accomplished quicker. *See generally United States v. Mahoney (Master Sergeant Jeffrey M. Nourse, Real Party in Interest)*, 28 M.J. 865 (A.F.C.M.R. 1989), *pet. denied* 31 M.J. 484 (C.M.A. 1990). The appellant also challenges the trial judge's accounting of the days attributable to the government after the speedy trial motion was denied. All-in-all, the appellant argues the government is responsible for *123 days* which is *3 days* over the 120-day speedy trial provision of R.C.M. 707(a). Accordingly, he argues he was denied a speedy trial and asks that his murder

conviction be set aside. *See United States v. McFarlin*, 24 M.J. 631 (A.C.M.R. 1987).

One aspect of the appellant's speedy trial issue, and one which was not addressed by the parties at trial or by appellate counsel, is the effect of his right to further appeal on starting the speedy trial clock for a rehearing. Without considering the right to appeal, the rule is that, in the case of an appellate reversal, a rehearing must be held within 120 days of the date the convening authority is notified of the final decision authorizing a rehearing. *United States v. McFarlin, supra.* However, this rule does not apply in this case.

Our decision in *Mansfield I,* while setting aside the appellant's conviction and ordering a rehearing, also contained a holding giving Mansfield the right to petition the Court of Military Appeals for review. In *Mansfield I,* in addition to our disposition of the ineffective assistance of counsel claim, we upheld a denial of another speedy trial motion. Thus, the appellant had the opportunity to petition the Court of Military Appeals on his original speedy trial claim of error, and if successful in his appeal, the charges would have been dismissed. In that event, no rehearing would have taken place.

R.C.M. 1203(d)(2)(A) gives an accused the right to petition the Court of Military Appeals within 60 days after notice of the lower court's ruling. *See United States v. Myers,* 28 M.J. 191 (C.M.A. 1989). Appellant was notified of our decision in *Mansfield I* on 1 June 1987, and had until 30 July 1987, to petition the Court of Military Appeals on the speedy trial issue. The appellant allowed the appeal period to expire without any action on his part.

Logic would suggest that the speedy trial clock on a rehearing should not start until the accused's appeal period has run or he was waived the right to appeal. Appellant had a statutory right to appeal our adverse ruling on the speedy trial issue, and had he done so within the 60-day period allowed him, jurisdic-

tion of his case would have vested in the Court of Military Appeals, and no rehearing would be possible until that court acted on his petition. Article 67, UCMJ, 10 U.S.C. § 867; *see also Goodman v. Secretary of the Navy*, 21 U.S.C.M.A. 242, 45 C.M.R. 16 (1972).

Accepting the premise that the speedy trial clock on a rehearing does not start until an accused's appeal period has passed or he has waived the right to appeal, we conclude the appellant was brought to trial within the prescribed period, and therefore R.C.M. 707 was not violated. However, our decision to resolve this issue against the appellant does not rest on this conclusion alone. We have examined the trial judge's findings of fact, the controlling case law, and the record of trial. We find no basis to overturn his ruling denying the motion to dismiss.

CHOICE OF COUNSEL

Appellate defense counsel argue the United States Air Force "improperly infringed" upon the appellant's Sixth Amendment right to choice of counsel when it was slow in disbursing his back pay when his first conviction was reversed.

In an affidavit submitted to this court over 2 years after the trial, the appellant claims he wanted a named civilian practitioner to represent him at his retrial in 1987. He stated the civilian attorney needed "an advance payment of $15,000 to $20,000" to represent him. He further states he lacked available funds to meet this condition and intended to use his back pay to provide the retainer. The appellant also averred that repeated inquiries by him the status of his back pay went unanswered,, and that it was not until February 1989 that the matter was resolved. All told, after the deduction of monies owed the government, the appellant received approximately $36,000.

The civilian counsel involved also submitted an affidavit acknowledging he was prepared to represent the appellant upon payment of the retainer previous mentioned. The attorney fur-

ther indicated he told the appellant "that if the Air Force did not pay him his full back pay in time to arrange for my represntation, that he [should] utilize that failure as a major issue in his appeal . . . [should that be necessary]."

The appellant's desire to be represented by civilian counsel was never voiced at trial. In fact, on two separate occasions, the appellant, when questioned by the trial judge and told of his right to civilian counsel at his own expense, stated he was satisfied with his military counsel. No mention was made of ;the situation of which he now complains. The record establishes a clear and unequivocal waiver of the right to be represented by civilian counsel. *See generally United States v. Perez,* 18 U.S.C.M.A. 24, 39 C.M.R. 24 (1968).

SENTENCE CREDIT

Appellate defense counsel maintain the appellant is entitled to 2 additional days credit toward his life imprisonment sentence. They argue the convening authority failed to credit him properly for the time spent in pretrial confinement.

Since Mansfield was sentenced to life imprisonment, it is tempting to apply the principle of *De Minimis Non Curat Lex* to this situation. However, since any confinement is the deprivation of personal freedom for a specified period, it is axiomatic that a confined person should be released once the confinement has been served.[2] *See United States v. Hilt,* 18 M.J. 604 (A.F.C.M.R. 1984).

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[2] There is a tale told of a 17th Century English Justice who, while visiting one of His Majesty's prisons, asked to be placed in a pillory so he might better understand the punishment he regularly adjudged. While there, the locks jammed and it was sometime before a locksmith released him.

Later, he was sitting in lawsuit where the plaintiff was seeking money damages for being kept in the pillory beyond the specified time of punishment. The barrister representing the Prison Keeper made light of the situation, saying "it was only for a few hours." The Justice, looking

We choose to resolve any ambiguity in the trial judge's ruling in this area in favor of the appellant. Accordingly, the appellant is entitled to 2 days additional credit toward his period of confinement. Such credit is to be applied when it has a meaningful effect.

CLEMENCY MATTERS

Appellate defense counsel direct our attention to the clemency recommendations submitted on the appellant's behalf and suggest that the trial transcript and allied papers fail to establish these recommendations were considered by the convening authority prior to taking action on the case. *See United States v. Craig*, 28 M.J. 321 (C.M.A. 1989). The government has responded with an affidavit from the convening authority stating that he considered all of appellant's clemency matters prior to approving the sentence. *See United States v. Blanch*, 29 M.J. 672 (A.F.C.M.R. 1989). We are satisfied the convening authority properly discharged his responsibilities under R.C.M. 1107(b)(3).

POST-TRIAL DELAY

The convening authority took action on the record 423 days after the sentence was announced. Appellate defense counsel consider the intervening period an "inordinate and unreasonable delay." While conceding that the proceeding resulted in "a large record of trial,"[3] the appellant aruges the government

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down from the bench, asked the barrister if he had ever been placed in the stocks. The barrister, with indignation, replied, "Of course not, milord." Whereon the Justice announced, "I have, and it is not the small thing you make of it."

[3] In pleadings before this court, appellate defense counsel refer to the appellant's trial as the "most complicated and vexing case in Air Force history" with "no other case match[ing] it in size, number of errors, complexity, and the like." To now argue that the time needed to process

mismanaged the post-trial typing and assembling of his transcript by choosing "to use inefficient procedures for case processing." The appellant claims he was prejudiced in four areas by the government's "snail-like" handling of his record of trial.

First, since his return to the USDB, his right to communicate with counsel had been interfered with. He specifically claims his correspondence with his appellate counsel has been opened and examined by unauthorized personnel. The appellant does not say how this was the result of post-trial processing, and we also see no connection.

Second, the appellant argues, that because of the delay, a convening authority other than the one he expected took action on his case. Again we see no prejudice as an accused *is not* entitled to a convening authority of his own choosing. What he is entitled to is an individualized, legally appropriate, and careful review of his sentence by the proper convening authority, and this is what he received. *See United States v. Fernandez*, 24 M.J. 77 (C.M.A. 1987).

Third, that "between the post-trial delay and other government malfeasance," his restoration to duty and clemency consideration was delayed approximately 5 months. This claimed prejudice appears to be grasping at straws, since there is little likelihood that a prisoner serving a life sentence for premeditated murder would be restored to duty within 18 months of the announced sentence.

Fourth, the appellant maintains his medical problems have been "aggravated," and he incurred "a disproportionate tax liability" when he received a lump sum payment for his back pay. He further asserts that, although he is a "highly trained and skilled mechanic," he has been denied the opportunityof maintaining his technical expertise despite the fact that such oppor-

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such a transcript was excessive and unreasonable, appellate counsel appear to be seeking to run with the foxes and howl with the hounds.

tunities exist at the USDB. He complains he has been assigned "to 'KP' and janitorial duties." Because of this prejudice, appellant asks that we affirm no more that 18 years confinement.

The government, on the other hand, argues that the time needed to assemble and forward the appellant's record was reasonable under the circumstances. They point out the distances involved between the trial judge, the court reporters, trial personnel, and the convening authority. The military judge's examination of the record resulted in approximately 60% of the pages being retyped. Further, it appears that ;the trial defense counsel misplaced three volumes of the record in a cupboard causing those volumes to be mailed at a later date.

The general thrust of the appellant's argument on this issue is that the post-trial processing could have been accomplished faster. This, of course, is not the standard. The administrative handling of any record of trial can be examined with 20-20 hindsight to identify areas where the processing could have been improved. The standard is not whether the post-trial processing could have been done sooner, but whether the time it did take was reasonable. Further, where the time taken is unreasonable, the appellant must show he has been prejudiced. Here, he has shown neither unreasonable delay or prejudice. In the situation before us, we conclude that the period required to assemble, read, and act on the appellant's record of trial was reasonable given the record's size and complexity. *United States v. Dunbar* 31 M.J. 70 (C.M.A. 1990). *See United States v. Bourgette*, 27 M.J. 904 (A.F.C.M.R. 1989), *pet. denied*, 28 M.J. 431 (C.M.A. 1989).

COMPLETENESS OF RECORD

Appellate defense counsel maintain that the appellant has been denied due process of law because the record of trial does not contain two video tapes that were admitted into evidence and viewed by the court members. This issue is moot as the

video tapes have been deposited with this court and were available for appellate review.

SUFFICIENCY OF EVIDENCE

Appellate defense counsel assert that Mansfield is not guilty of premeditated murder, by reason of a lack of mental responsiblity. They state that much of the appellant's 32 volume record of trial "is nothing more than prosecutorial redundancy." Appellate counsel point out that the parties stipulated that on 3 February 1984, the appellant met Yang in an alley between 2100 and 2200. The stipulation goes on to say that Yang, whose body was discovered the next morning, died of a knife wound that severed a main blood vessel. Hence, as appellate defense counsel stated in their brief, "[I]t is fair to say that the appellant 'was indeed a physical agent of Mr. Yang's death.' "

It is apparent, as counsel admit, that Mansfield's mental state was the central issue at trial and a major point on appeal. Accordingly, counsel argue that the prosecution failed to prove, beyond a reasonable doubt, that the appellant possessed the substantial capacity to conform his conduct to the requirements of the law. They ask that we exercise our fact-finding powers under Article 66(c), UCMJ, 10 U.S.C. § 866(c), to hold that the appellant was not mentally responsible at the time of the offense, find appellant not guilty, and dismiss the charge and specification.

An accused's mental responsibility is a factual determination to be made by the court members under proper instructions. *United States v. Ott,* 26 M.J. 542 (A.F.C.M.R. 1988), *pet. denied,* 27 M.J. 476 (C.M.A. 1989); *United States v. Benedict,* 20 M.J. 939 (A.F.C.M.R. 1985), *rev'd on other grnds,* 27 M.J. 253 (C.M.A. 1989). At trial both sides offered extensive expert testimony about Mansfield's mental state. In the facts portion of this decision we related this testimony in some detail. Needless to say, it is in conflict. However, proof beyond a reasonable doubt does not mean that the evidence must be free from conflict. *United States v. Lips,* 22 M.J. 679 (A.F.C.M.R. 1986).

The court members heard and evaluated this testimony along with the other evidence in the case. They were convinced beyond a reasonable doubt of the appellant's guilt. Our statutory mandate requires us to review and weigh the evidence, and, making allowances for not having personally observed the witnesses, determine whether we are convinced of appellant's guilt beyond a reasonable doubt. Article 66(c), UCMJ; *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). This was a lengthy and hard fought trial with both sides mustering all available evidence. We have examined the record of trial and, like the court below, are convinced beyond a reasonable doubt that the appellant is guilty of the offense alleged. *United States v. Neeley*, 21 M.J. 606 (A.F.C.M.R. 1985), *aff'd* 25 M.J. 105 (C.M.A. 1987), *cert. denied*, 484 U.S. 1011, 108 S.Ct. 710, 98 L.Ed.2d 660 (1988).

SENTENCE APPROPRIATENESS

Finally, appellate defense counsel suggest that a mandatory life sentence is "inappropriately severe" given the totality of appellant's circumstances. Appellate counsel portray the appellant as the victim of a "totally amoral" woman who controlled him like a marionette. Appellate counsel concede the appellant should be punished, but argue he does not deserve "life in prison."

The record establishes that the appellant killed the victim under a plan that was both carefully thought out and executed. It was not the result of sudden passion or provocation. And, just as "being in love is not a mental disease," neither is it a mitigating circumstance warranting amelioration of a life sentence for premeditated murder. We consider the imposition of a mandatory life sentence in this case to be entirely appropriate. For the reasons heretofore stated, the findings of guilty and the sentence are

AFFIRMED.

Chief Judge (Pro Tempore) MURDOCK concurs.

LEONARD, Senior Judge, dissenting:

Although I agree with a subtantial portion of the majority's opinion, I must dissent from their analysis of the first two issues—ineffective assistance of counsel and the admission of the "Life Story."

In our prior review of this case, we were required to address the issue of ineffectiveness of counsel at appellant's first trial. Seeking adequate facts to decide the issue, we remanded the case for a *DuBay*-type evidentiary hearing. Our remanding order listed the issues on which we needed further information. The military judge who presided at the evidentiary hearing mistook our order as a warrant to compel surrender of any attorney-client communications between appellant and his original defense counsel. Among the communications he directed released was a detailed "Life Story" appellant wrote at his counsel's request. This hand-written statement was a complete confession of the circumstances surrounding the death of Yang.

At appellant's second trial, the military judge's rulings aggravated the erroneously compelled disclosure of the "Life Story" at the evidentiary hearing. Despite strenuous defense objections every step of the way, the military judge ruled the "Life Story" had to be disclosed to trial counsel, allowed trial counsel to read it to the court members under a pretense of cross-examination, and finally admitted it into evidence as appellant's confession.

I agree with appellant's contention that the compelled release of the "Life Story" and the rulings of the military judge at the second trial combined to deprive him of a fair trial. The only viable remedy is to set aside appellant's second conviction.

FACTS

Mansfield prepared prosecution exhibit 65—"Life Story"—prior to his first trial at the request of one of his defense counsel.

This counsel directed Mansfield to write a narrative statement detailing his recollection of the confrontation with Yang in Korea and the events leading up to it. In his own writing, Mansfield prepared a 58-page statement that counsel later copied in a 23-page typed version.[4] Mansfield's lawyers treated both the handwritten and typed versions of this statement as "attorney work product" and kept them in their case files. The narrative statement told of efforts to hire a "hit man" in Korea and of the purchase of a knife by Mansfield before his meeting with Yang.

After Mansfield told his counsel the statement contained many falsities he added to try to convince them of his believability, counsel continued to press him for the true facts. Because they did not think they knew the truth, Mansfield's counsel advised him not to cooperate with the first sanity examination scheduled by the government at Yokota Air Base, Japan. However, the more counsel probed Mansfield, the more they became aware of his "preoccupations and obsessions." Finally, Mansfield's counsel requested a R.C.M. 706 mental examination and Doctor Vosburg convened a one-member board on 25 June 1984. He found Mansfield had a mental disorder that caused a diminished capacity to appreciate the criminality of the offense and an inability to conform his conduct to the requirements of the law. The defense did not provide Doctor Vosburg the "Life Story" at the time of the mental examination.

When Mansfield related another scenario his counsel believed closer to the truth, they prepared another statement of Mansfield's recollection of the confrontation with Yang and the events preceding it. They provided this second version to civilian psychiatrists examining Mansfield before his first trial. The

[4] The "Life Story" or first narrative statement by Mansfield is referred to as a 22-page or 25-page statement in our order and at various points during the evidentiary hearing and the second trial. An examination of the actual exhibit shows the typed version to be 23 pages.

second mental examination that occurred at Travis Air Force Base, California in September 1984 also received this version. Missing from the second version was any information about trying to hire a "hit man" or buying a knife before meeting with Yang. However, during his personal interview with a civilian psychiatrist, Doctor Coburn, Mansfield told about considering hiring a "hit man."

At Mansfield's first trial, his counsel planned a two-pronged defense. First, they intended to hold the prosecution to its burden of proving beyond a reasonable doubt that Mansfield had killed Yang. Second, they planned to show Mansfield's lack of mental responsibility. For the second prong, they had arranged for the testimony of Doctor Vosburg and Doctor Coburn. Both psychiatrists were prepared to testify that, at the time of the offense, Mansfield had a diminished capacity to appreciate the criminality of the alleged offense and lacked the capacity to conform his conduct to the requirements of the law.

After the trial began, but before the defense called their witnesses, they discovered, much to their surprise, that Doctor Coburn's interview notes mentioned Mansfield trying to hire a Korean "hit man" to kill Yang. Doctor Coburn was also surprised and informed the defense that he had not considered the "hit man" information in arriving at his opinion and preparing his report. However, after considering this information, he did not change his opinion.

At this point, Mansfield's counsel faced a real quandary. The miltary judge had already ruled that, if the defense called expert witnesses to testify about mental responsibility, the prosecution could discover any of Mansfield's statements used to arrive at the opinions. The defense team understood this to mean, if Coburn testified, the "hit man" statement would be given to the prosecution for use in their cross-examination. Fearing that this disclosure would devastate their case, Mansfield's counsel elected not to present a mental responsibility defense.

The appeal from the first trial raised an issue of ineffective assistance of counsel. Part of the claim of ineffectiveness relied upon the failure of Mansfield's counsel to present a mental responsibility defense. Our response to the claim of error was to order an evidentiary hearing to develop the facts related to the question of Mansfield's lack of mental responsibilty and ineffective assistance of counsel.

When the evidentiary hearing convened, the parties addressed the impact of the claim of ineffectiveness of counsel upon Mansfield's attorney-client privilege. Defense and government counsel agreed a waiver of the privilege would apply, but that evidence adduced at the hearing could only be used to resolve the issue of ineffective assistance of counsel as it related to the mental responsibility defense. The military judge ruled that communications between Mansfield and his prior counsel would be included in this limited use waiver. Mansfield's hearing defense counsel maintained a continuing objection to waiver of the attorney-client privilege for any other use and any waiver broader than necessary to resolve the issue.

The "Life Story," that became prosecution exhibit 65 at the second trial, came to light during the evidentiary hearing testimony of one of Mansfield's counsel from his first trial. Upon hearing the testimony, government counsel asked for the document. Before producing it, Mansfield's hearing counsel made it clear that he was providing the statement only because of the military judge's previous ruling finding waiver of such attorney-client communications. Counsel also restated his objection to any use of the document outside the scope of the evidentiary hearing ordered by the Court. The document that would later become prosecution exhibit 65 was marked as hearing exhibit 7 and provided to the government counsel. The second narrative version was marked as hearing exhibit 8. Both exhibits were appended to the record of the evidentiary hearing.

At Mansfield's second trial, his counsel contended the government could not use any evidence that they had gained access

to, or become aware of, through the limited waiver of attorney-client privilege during the evidentiary hearing. He argued that Mansfield only waived the privilege to show the ineffective assistance of his counsel at the first trial and use of this compelled evidence in the second trial would violate due process.

Both the government and the defense agreed that the evidence introduced at the evidentiary hearing warranted "limited use" protection. However, the parties' understanding of "limited use" was different. Mansfield's counsel argued that waiver of the attorney-client privilege only applied to prove ineffective assistance of counsel and the privilege still existed and barred use of the evidence for any other purpose. The government maintained that, once waived, the privilege no longer existed. In their view, only limited admissibility protection under Mil.R.Evid. 105 remained to protect the hearing evidence.

The question of the use of hearing exhibits 7 and 8 arose early in the second trial. Before trial, Mansfield's counsel requested discovery of mental examination reports of their client held by the government. *See* R.C.M. 701(a)(2)(B). In return, defense counsel gave the government reports of mental examinations of Mansfield prepared by the defense expert consultants. *See* R.C.M. 701(b)(4). However, trial counsel wanted more. They asked for any statements of Mansfield related to the reports of the defense experts. Although neither trial counsel participated in the first trial or the evidentiary hearing, they were aware of the existence of certain statements prepared by Mansfield, particularly the "Life Story," and wanted access to them.[5]

Defense counsel made a motion in limine to prevent trial counsel from getting either hearing exhibit 7 or 8. Defense

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[5] The record does not reveal how the trial counsel became aware of Mansfield's statements. They could have read the evidentiary hearing transcript, been told of the statements by the hearing government counsel, or they could have read about them in our first opinion in this case.

counsel relied upon the ruling of the trial judge in Mansfield's first trial and an analogy with Mil.R.Evid. 302(c) which prohibits release of an accused's statements given during a R.C.M. 706 compulsory mental examination until the defense first introduces them into evidence.

Trial counsel opposed the motion in limine, taking a position that any statements made by Mansfield to the defense experts were incorporated into the experts' reports and were discoverable under R.C.M. 701(b)(4). In their view, no compulsion existed in the accused's interviews with defense experts, and Mil.R.Evid. 302 provisions designed to protect compelled statements were inapplicable.

In disposing of the motion in limine, the military judge limited government's access to defense experts before trial to the same extent as their access to the members of a sanity board. He ruled, once a defense expert appeared to testify, trial counsel could interview him about the basis for his opinion and review any statements, including those of the accused, the expert, relied upon in forming his opinion.

At the close of the government's case, Mansfield's counsel stated they were proceeding with an insanity defense. They told the military judge they had provided the government Mansfield's statements to the defense experts and defense experts were available for interviews by the government. The court-martial then adjourned fora few days to allow the government an opportunity to examine the released documents and interview the defense experts.

When the court-martial reconvened, Mansfield's defense counsel objected to the government using hearing exhibits 7 and 8 to cross-examine defense experts or for rebuttal. The government opposed any limits on the use of hearing exhibit 7 or 8. The military judge agreed with the govenrment and ruled that both hearing exhibit 7 and 8 could be used by the government in the cross-examination of the defense experts.

Trial counsel used the statements extensively in his cross-examination of the defense experts. Finally, after the last defense expert (Doctor Coburn) testified, trial counsel offered hearing exhibit 7 into evidence as prosecution exhibit 65. Over the objections of defense counsel, the military judge admitted the exhibit as a confession of appellant with no restrictions on its use.

ANALYSIS AND THE LAW

On appeal to us, appellant argues he was denied a fair trial because of knowledge the government gained from the evidentiary hearing and the military judge's error in admitting prosecution exhibit 65.

The majority's approach to the asserted errors does not directly address four issues preserved for review and raised before us. These four issues are:

> 1. Whether the compelled release of hearing exhibit 7 at the evidentiary hearing entitled the government to use this statement at appellant's second trial?
>
> 2. Whether appellant's defense counsel at his second trial waived any privilege or other protection entitled hearing exhibit 7?
>
> 3. Whether the government was properly permitted to use hearing exhibit 7 during cross-examination of the defense expert witnesses?
>
> 4. Whether prosecution exhibit 65 should have been admitted into evidence?

1. *Was the Government Allowed to Use Hearing Exhibit 7 Based on the Compelled Release at the Evidentiary Hearing?*

In my view, the government could not rely on the compelled release of hearing exhibit 7 at the evidentiary hearing as the

basis for using this exhibit at Mansfield's second trial. Following the evidentiary hearing, the exhibit was still protected by either the attorney-client privilege or a limited use protection.

Appellant contends compelling him to waive the attorney-client privilege and release hearing exhibit 7 to the government at the evidentiary hearing gave the government an unfair advantage from that point forward. He argues the government's further prosecution of appellant's case was "tainted" by the government's knowledge of the statement. In support of their argument, they use an analogy to *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), which requires the government to show affirmatively that none of its evidence at a subsequent prosecution is derived, directly or indirectly, from previously provided immunized testimony. *See United States v. Boyd*, 27 M.J. 82, 86 (C.M.A. 1988).

I agree with the majority that the *Kastigar* analogy does not apply to appellant's situation. However, I do not agree a compelled waiver of the attorney-client privilege to prove ineffective assistance of counsel completely eliminates any privilege for the disclosed matter. When an erroneously compelled disclosure of attorney-client privileged statements occurs, the statements are not admissible against the holder of the privilege. Mil.R.Evid. 511(a). Therefore, the key to whether any privilege remained for appellant's statements is the correctness of the military judge's ruling at the evidentiary hearing.

On 5 March 1986, we issued an unpublished order for an evidentiary hearing to resolve factual questions regarding the defense of mental responsibility and appellant's claim of ineffective asssitance of counsel. Our order required the military judge conducting the hearing to make specific findings of fact on the following questions:

> What was the extent of trial defense counsel's pretrial investigation of the facts and law relating to an insanity defense? Was the defense of insanity a "created"

> defense? If so, . . . what role if any, did the appellant have in its creation? What role, if any, did the report of Doctor Vosburg play in preparing an insanity defense? During the course of counsel's investigation what if any information did they verify about a "hit man?" If so, when? Did counsel instruct appellant to withhold information from Doctor Coburn about a "hit man?" If so, when? Why did counsel wait until after the trial had begun to discuss this information with Doctor Coburn? Why was the 22 page statement by the appellant prepared? When? Why did counsel assert at trial that the military judge's discovery order regarding the 22 page statement changed the defense strategy? What, if any, advice was given by defense counsel concerning release of the 22 page statement at the trial? Why did counsel assert in their *Goode* response that the military judge's ruling regarding the statement was error? When and how did Doctor Coburn learn of the "hit man" information? What impact did this information have on his professional opinions?

The military judge conducting the hearing ruled that our order required the release of any attorney-client privileged communications bearing on the issues of ineffective assistance and the insanity defense.Further, he specifically required the defense to release both versions of appellant's written narrative statements. Appellant's counsel made it clear that he was only releasing appellant's statements because the military judge ordered their release. Counsel maintained that the only portions of these statements arguably relevant to thehearing were any references to use of a "hit man." He maintained a continuing objection to the release or use of attorney-client privileged communications any broader than necessary to resolve the specific issues this Court referred to the evidentiary hearing. De-

spite these objections, the military judge directed release of the entire text of both narrative statements to the government representative.

Our order of 5 March 1986 did not require Mansfield or his counsel to surrender any attorney-client privileged documents. Answers to all the questions asked in the order were available from the hearing testimony of appellant's original defense counsel, Doctor Vosburg, and Doctor Coburn without requiring release of any written statement Mansfield had made to his counsel. The military judge interpreted our order more broadly than necessary and erroneously compelled appellant to reveal the attorney-client communications contained in hearing exhibits 7 and 8. Absent a subsequent voluntary waiver, neither hearing exhibit 7 or 8 should have been admitted against Mansfield at his second trial. Mil.R.Evid. 511(a).

Further, even if the military judge's ruling were correct, the government agreed, at both the evidentiary hearing and appellant's second trial, that privileged matters released at the hearing still had limited use protection under Mil.R.Evid. 105. The military judge at the second trial adopted this reasoning and ruled this limited use protection remained in effect at the second trial.

2. *Did Appellant's Counsel at the Second Trial Cause a Waiver of Any Protection Still Accorded Hearing Exhibit 7?*

The military judge at the second trial ruled that defense actions during the second trial waived any remaining protection accorded hearing exhibit 7. He found this waiver occurred because the defense expert witnesses had reviewed both versions of appellant's narrative statements. That ruling contradicted a previous ruling and, under the circumstances of this case, was in error.

Earlier, in response to defense counsel's motion in limine to prevent disclosure of hearing exhibits 7 and 8, the military judge

had ruled the government's access to defense experts and members of mental examination boards would be the same. He ruled, prior to the defense electing to proceed with a mental responsibility defense, the prosecution could interview the defense experts to the same extent they could interview mental examination board members. He further held, once a defense expert appeared to testify, the government could reinterview the defense experts and review reports and statements of the accused *the expert relied upon in arriving at his opinion.* At the time of this ruling, the defense had not yet given notice under R.C.M. 705(b)(2) of an intent to rely upon the defense of lack of mental responsibility. Although such notice is normally required before beginning trial on the merits, the military judge had allowed the defense to postpone notice until the close of the government's case.

According to this ruling, appellant's statements were not available to the government until the witnesses appeared to testify and then only if the experts were relying upon the statements. The military judge's ruling in response to the motion in limine was correct with respect to government access to appellant's statements. Mil.R.Evid. 705 provides an expert may give opinion testimony and give his reasons for the opinion without prior disclosure of the underlying facts or data, unless the military judge requires otherwise. The rule further provides: "The expert may in any event be required to disclose the underlying facts or data on cross-examination."

The only incorrect aspect of the original ruling was with respect to allowing the government to interview the defense experts before the defense elected a mental responsibility defense.

Up until the point the defense experts identified their experts as potential witnesses for the mental responsibility defense, revealing appellant's statements to the civilian psychiatrists hired by the defense or to Doctor Vosburg certainly did not waive any

protection accorded the statements. The civilian psychiatrists were defense consultants hired with the approval of the convening authority and Doctor Vosburg had conducted a mental examination under R.C.M. 706(b).

Expert consultants act as members of the defense team or defense representatives. *United States v. Turner*, 28 M.J. 487 (C.M.A. 1989); *United States v. Langston*, 32 M.J. 894 (A.F.C.M.R. 1991). Confidential communications by an accused or his attorney to such consultants will not waive the protection accorded such communications. *See United States v. Toledo*, 25 M.J. 270, 275 (C.M.A. 1987), *cert. denied*, 488 U.S. 889, 109 S.Ct. 220, 102 L.Ed.2d 211 (1988), *aff'd on rehearing*, 26 M.J. 104 (C.M.A. 1988); *Langston*, 32 M.J. at 896; *United States v. King*, 32 M.J. at 709 (A.C.M.R. 1991); Mil.R.Evid. 502(b)(3). As long as they are consultants for the defense, the experts may not be interviewed by the prosecution or be compelled to disclose privileged communications made to them by the accused or other members of the defense team. *Id.* If the defense consultants later become expert witnesses, they may be interviewed by the prosecution and cross-examination about the basis for any opinion they may offer. *Turner*, 28 M.J. at 489; *Toledo*, 25 M.J. at 274 n. 2; Mil.R.Evid. 706(a); R.C.M. 703(d); Mil.R.Evid. 705.

Statements of an accused made to a member of a board conducting a mental examination under R.C.M. 706(b) are privileged. Mil.R.Evid. 302(a). This privilege continues until the accused first introduces into evidence the statements or derivative evidence. Mil.R.Evid. 302(b)(1). Further, the prosecution cannot obtain an accused's statements to a R.C.M. 706 mental examination board until the defense first offers such statements into evdience. Mil.R.Evid. 302(c). Government interveiws with members of a mental examination board may not inquire into statements the accused made to the board unless the accused first offers such statements into evidence or voluntarily dis-

closes them to the government. *United States v. Littlehales*, 19 M.J. 512 (A.F.C.M.R. 1984); Mil.R.Evid. 302(c); R.C.M. 706(c)(5).

Despite the ruling's erroneous granting of early interviews of defense expert consultants, there is no evidence of record that it caused any prejudice to appellant. Because of the limitations on the extent of such interviews with the defense experts, it appears trial counsel did not interview the experts prior to the defense giving notice of a mental responsibility defense.

Unfortunately, prejudice did flow from the military judge's later abandonment of the other aspect of his motion in limine ruling. Forgetting that he had earlier ruled statements would not be discoverable unless expert witnesses had relied upon them, he erroneously held that the mere review of hearing exhibit 7 by defense expert witness waived any protection accorded the exhibit.

In arguing against such waiver, defense counsel asserted that they had no choice in allowing their experts to review the statements. Both Doctors Coburn and Vosburg were required to review both statements as part of their testimony at the evidentiary hearing. According to counsel, the defense also had no choice with respect to the other two psychiatrists, Doctors Beck and Strefling. After the military judge's ruling on the motion in limine, the defense felt they had to take reasonable precautions to prepare Doctors Beck and Strefling for possible cross-examination on the exhibit. However, defense counsel continued to strongly argue that none of the defense experts were relying on the statement as a basis of their opinions. In effect, the defense team was trying their best to stay within the parameters of the military judge's motion in limine ruling, still present a viable mental responsibility defense, and avoid the trial counsel's use of hearing exhibit 7. However, their strategy was to no avail when the military judge changed the rules.

The military judge should have stuck with his earlier ruling and allowed the defense an opportunity to show their expert

witnesses' opinions did not rely on hearing exhibit 7. Repercussions of the military judge's changed views laid the basis for trial counsel's improper and devastating use of hearing exhibit 7 in cross-examination of defense expert witnesses.

3. *Could the Trial Counsel Use the Narrative Statements to Cross-examine the Defense Psychiatrists?*

In compliance with the military judge's rulings, defense counsel released both hearing exhibits 7 and 8 to trial counsel after notification of a mental responsibility defense and that the defense experts would testify in support of the defense. However, after the release, defense counsel strongly objected to trial counsel using the exhibits to cross-examine defense expert witnesses. The defense contended that the statements were still protected by the attorney-client privilege. They acknowledged defense experts had reviewed the statements, but contended the experts were not relying on them to form an opinion as to appellant's mental responsibility.

In response to this objection, the military judge erroneously ruled, as long as the defense experts had seen both narrative statements and any privilege with respect to them had been waived, trial counsel could use them in cross-examination.

The mere release of the narrative statements to trial counsel did not necessarily give him the authority to use the statements outside his interviews with the defense psychiatrists. His ability to use the statements in cross-examination depended upon the circumstances of each psychiatrist's access to the statement and the extent, if any, the expert relied upon the statement to form his opinon.

Doctors Beck, Coburn, and Strefling had no previous involvement with any mental examination ordered under R.C.M. 706(b). Neither Beck or Strefling were potential expert witnesses at the first trial and they did not testify at the evidentiary hearing. They reviewed both versions of the narrative statement

to prepare them for expected cross-examination. Appellant related portions of the first narrative statement to Doctor Coburn during interviews in preparation for the first trial. Coburn also reviewed both versions during his testimony at the evidentiary hearing. None of the three testified that he relied upon either narrative statement as a basis for his opinion.

During Beck's direct examination, there was only one reference to hearing exhibit 7. Near tthe end of direct examiantion, after he had already expressed his opinion and the basis for it, defense cou:sel asked kDoctor Beck four hypothetical questions based on facts similar to some portions of hearing exhibit 7.

In response to each question, Doctor Beck either explained how the posed hypothetical would support his opinion or that it did not change his opinion.

Cross-examination of Doctor Beck was extensive. After exploring the reasoning behind Doctor Beck's opinion, trial counsel began asking Doctor Beck about "an approximately 22-and-a-half page, single-spaced, legal size document—typed single-spaced, which was taken verbatim from some 58 pages of handwriting." When the witness stated he was not sure what was being referred to, the trial counsel replied: "I'll hand you one. It's titled 'Life Story.' " Trial counsel continued with the following:

> TC: And this, sir, is what we purport to be a statement by the accused that he had made originally to his defense counsel, in fact at that point in time?
> Wit: YUes.
> TC: Sir, you're under the impression, are you not, that this was in fact the accused's first version to the defense counsel at that time?

After Doctor Beck replied that he did not know the version or the order of the statement, trial counsel tried twice more to get

him to agree that the document was Mansfield's first version of events.

Once everyone's attention was fully drawn to the document handed to Doctor Beck, trial counsel proceeded line by line, page by page through the sttatement. For every question, trial counsel read from the statement and then had Doctor Beck agree that those words were in fact in the statement. This procedure continued for 22 pages of record until trial counsel finally arrived at the last page of the statement. Other than the first question, there were no attempts to relate the questions to any portion of Doctor Beck's opinion. Trial counsel never asked Doctor Beck if the quoted portions of the statement affected his opinion.

Doctor Strefling was a military psychiatrist at the Fort Leavenworth, Kansas Disciplinary Barracks. His only reference to the statement during direct examiantion was after he had given his opinion and the basis for it. Defense counsel then asked if Strefling were aware of statements by appellant and whether he had considered them. He replied affirmatively.

The cross-examination of Doctor Strefling was not as extensive. Trial counsel made only one direct reference to either narrrative statement and that ererence only dealt with the nature of appellant's contacts with Un-Cha Haney before and while he was in Korea.

Doctor Coburn's direct examination briefly referred to the narrative statements. After he expressed his opinion, defense counsel asked about his familiarity with "statements attributed to Sergeant Mansfield that have been referred to as Hearing Exhibits 7 and 8?" Defense counsel asked if he were aware that one of the statements referred to discussions about hiring someone to kill Yang and to the purchase of a knife that may havbe been used in the killing. He replied that he was, he had considered them, and they did not alter his opinion.

Doctor Coburn's cross-examination about the first version of

the narrative statement was almost as extensive as Doctor Beck's. Some 18 pages of cross-examination ask about hearing exhibit 7 and whether Doctor Coburn was aware of specific quotes from the statement. Trial counsel asked the questions in the format of "fAre you aware . . . ?" Doctor Coburn was not asked if the statements formed any basis for his opinion or if consideration of them changed his opinion. With few exceptions, no attempt was made to relate the "Are you aware" questions to any portion of Doctor Coburn's opinion.

Doctor Vosburg reviewed both versions of the narrative statement during his testimony at the evidentiary hearing. The only reference to either statement during Doctor Vosburg's direct examination was the following:

Q. Sir have you had occasion to read a document that has been attributed to Sergeant Mansfield?

A. You mean the Exhibits 7 and 8?

Q. It's been called variously Exhibits 7 and 8, or Life Story.

A. Yes, I have.

Q. You read such a document?

A. Yes.

Q. And have you considered a—the impact of what's contained within that document in your diagnosis of the case?

A. Yes, I have.

Q. And what effect has that had upon you diagnosis and your opinions?

A. I've kept the same opinion.

Doctor Vosburg's cross-examination concerning the narrative statements was brief. Trial counsel asked him if he was aware of the 58 page handwritten "Life Story." He then asked about Vosburg's awareness of references in the statement to discussions with a person in Korea to kill Yang for money and refences to buying a knife before meeting with Yang. No references were made too the second version of the statement.

Mil.R.Evid, 703 allows an expert witness to base an opinion

upon facts or data of the type reasonably relied upon by experts in the particular field of his expertise. The facts or data relied upon need not be admissable in evidence.

Although cross-examiners have great leeway to inquire into the basis of an expert's opinion, the right to do so is not unlimited.

First, the expert only has to disclose "the underlying facts or data" for his opinion. Mil.R.Evid. 705. The military judge recognized this when he originally ruled on the defense motion in limine to prevent trial counsel's discovery of the statements. In that ruling, he decided that the trial counsel could only discover the statements upon which a defense psychiatrist "relied in arriving at his decision."

Second, trial counsel cannot use cross-examination of an expert to "smuggle" hearsay or uncharged misconduct into a case. *See United States v. Cole*, 29 M.J. 873 (A.F.C.M.R. 1989), *aff'd*, 31 M.J. 270 (C.M.A. 1990); *United States v. Neeley*, 21 M.J. 606 (A.F.C.M.R. 1985), *aff'd*, 25 M.J. 105 (C.M.A. 1987).

In affirming *Neeley*, Judge Cox endorsed the recommendation of Saltzburg, Schinasi, and Schlueter to use Mil. R.Evid 403 as the means to resolve the admissibility of evidence elicited as part of the basis for an expert's opinion under Mil.R.Evid 703 and 705. *Neeley*, 25 M.J. at 107; S. Saltzburg, L. Schinasi, & D. Schlueter, *Military Rules of Evidence Manual* 595 (2d ed. 1986). Other federal courts considering the issue under Fed.R.Evid. 703 and 705 applied the balancing test of Fed.R.Evid. 403 to determine the admissibility of hearsay or uncharged misconduct as a basis for an expert's opinion. *See, e.g., United States v. Wright*, 783 F.2d 1091 (D.C. Cir. 1986); *Untied States v. Gillis*, 773 F.2d 549 (4th Cir. 1985).

To apply the balancing test under Mil.R.Evid. 403, the questions are: Is the proffered evidence relevant? If so, does the danger of unfair prejudice created by the testimony outweigh its

probative value? *United States v. Wingart*, 27 M.J. 128 (C.M.A. 1988); *Neeley*, 25 M.J. at 107. When performing the balancing test, the possible motives of counsel in eliciting the evidence may also be examined. *Cole*, 29 M.J. at 875; *Neeley*, 25 M.J. at 107.

The military judge in this case made two significant errors in ruling that trial counsel could use appellant's narrative statements to cross-examine the defense psychiatrists. First, he did not consider whether the opinions of the defense psychiatrists were even partially based on the statements. Second, he never performed a Mil.R.Evid. 403 balancing test. The record shows the only matters he considered before ruling were whether a privilege still protected the statements and whether the expert witnesses had reviewed the statements.

The military judge's ruling that mere review[6] of statements transforms such statements into a basis or "underlying facts or data" ignores the clear wording of Mil.R.Evid. 705. Under the facts of this case, forcing disclosure of the narrative statements and then allowing cross-examination on them really stretched the meaning of "underlying facts or data."

Further, when considering the admissibility of such highly prejudicial evidence, the military judge must not overlook the Mil.R.Evid. 403 balancing test. The information trial counsel sought to elicit through cross-examination on the narrative statements was certainly relevant. It concerned the story of the events leading up to the offense and the offense itself in appellant's own words. Portions of the statements were relevant to every element of the offense and the mental responsibility defense.

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[6] This was despite the defense argument that the defense experts' exposure to the statements was not at the choice of appellant or his counsel. Some of the experts reviewed the statements as a result of the evidentiary hearing and others were shown them because the judge's earlier rulings made cross-examination on them a good possibility. The defense always maintained the experts were not relying on the statements as a basis for their opinions.

However, appellant's narrative statements were not the only source of this information. Nearly all of it was available to trial counsel through the testimony of witnesses and documents introduced by the prosecution. Trial counsel could have used the information in cross-examination without attributing it to a statement of appellant.

On the other side of the R.C.M. 403 balancing scale are the danger of unfair prejudice and the motives of trial counsel to elicit the evidence. Allowing trial counsel to use the appellant's own detailed hand-written communication to his attorneys to cross-examine the defense experts was fraught with potential for abuse by trial counsel and improper interpretation by the members. Further, the record shows this danger was not merely speculative. Without any pretense of challenging the validity of the opinion of the first defense expert, trial counsel used the cross-examination merely to read "the accused's first statement to his defense counsel" to the court members. Trial counsel was not using the statement to attack the credibility or the bases of the defense psychiatrist's opinion, but in an obvious attempt to put the statement before the members as an admission or confession. Such a practice was condemned in *United States v. Parker*, 15 M.J. 146, 153 (C.M.A. 1983), as an improper use of a statement provided to examining psychiatrists.

Performing the balancing test the military judge failed to do, I find the danger of unfair prejudice clearly outweighs the probative value of allowing trial counsel to use appellant's narrative statements in cross-examination.

4. *Should Prosecution Exhibit 65 Have Been Admitted into Evidence?*

After the defense's evidence, trial counsel offered hearing exhibit 7 into evidence as prosecution exhibit 65. The government argued for admitting the statement on the disingenuous theory that, once the defense experts reviewed the statement and testified about it, the entire statement was admissible as a

confession of appellant. The majority opinion noted this theory of completeness in their analysis concerning admission of the statement. For authentication of the statement, trial counsel asked the military judge to take judicial notice of the evidentiary hearing and this Court's decision in *Mansfield I*. Specifically, trial counsel relied on evidentiary hearing testimony of Mansfield's counsel from his first trial describing how he had Mansfield prepare the narrative for him. Trial counsel also argued that the limited use protection accorded the statement at the evidentiary hearing no longer existed after the defense voluntarily revealed it to their expert witnesses.

Mansfield's counsel strongly objected to the admission of prosecution exhibit 65. First, counsel again asserted that none of the defense experts relied upon the statement as a basis for their opinions.

Second, counsel maintained no foundation for the exhibit existed outside the evidentiary hearing. He argued that using the evidentiary hearing as the foundation was totally inappropriate. The evidentiary hearing was ordered to develop evidence necessary to determine the effectiveness of Mansfield's representation at his first trial. The statement offered as prosecution exhibit 65 was an attorney work product before the government's representative at the evidentiary hearing had convinced the hearing military judge that it was pertinent to the issue of ineffective representation. Now the government was using this compelled release of the statement at the evidentiary hearing as the basis to introduce the statement at trial as a confession of Mansfield.

The military judge admitted prosecution exhibit 65. In doing so, he found defense waiver of the limited use protection accorded the statement at the evidentiary hearing. He ruled that waiver occurred when defense experts testified they had reviewed and considered the statement in forming their opinions. He took judicial notice that the authentication of hearing exhibit 7 occurred at the evidentiary hearing. He found the statement

was a confession or an admission by a party-opponent and was not hearsay, citing Mil.R.Evid. 801(d)(2)(A). Finally, he ruled that the relevance of the statement outweighed its potential prejudice.

The military judge's admission of prosecution exhibit 65 was erroneous for four reasons.

First, a theory of completeness offers no valid basis for admission of prosecution exhibit 65. In the recent case of *United States v. Cannon*, 33 M.J. 376 (C.M.A. 1991), the Court cvonsidered admission of an entire statement under the "rule of completeness" of Mil.R.Evid. 106. The Court held this rule did not justify admission of a statement containing uncharged misconduct because a witness was impeached during cross-examination on a portion of that statement. *Cannon*, 33 M.J. at 383. *Cannon's* rationale applies to trial counsel's introduction of prosecution exhibit 65.

Second, admission of prosecution exhibit 65 during the government's rebuttal was improper. The exhibit did not qualify as rebuttal to the defense's case and admitting it as a confession of appellant was error.

Trial counsel offered prosecution exhibit 65 after the conclusion of the defense's evidence. Evidence presented by the prosecution at this stage of the trial would have to qualify as rebuttal evidence unless the trial judge granted leave to reopen the government's case in chief. *See* R.C.M. 913(c)(1). No such leave was requested or granted.

Testimony of the defense psychiatrists did not deny the existence of prosecution exhibit 65 or disagree with any of the quotes trial counsel attributed to it. In fact, as trial counsel read line by line from the narrative statement, the psychiatrists readily admitted that the statement contained every detail trial counsel read. Therefore, the exhibit did not "explain, repel, counteract, or disprove" any of the testimony of the defense experts and was not proper rebuttal. *See United States v. Callara*, 21 M.J. 259 (C.M.A. 1986); *United States v. Writh*, 18 M.J. 214, 218

(C.M.A. 1984); *United States v. Strong*, 17 M.J. 263, 266 (C.M.A. 1984).

Third, the government could not introduce prosecution exhibit 65 as appellant's confession. Mansfield created prosecution exhibit 65 as an attorney-client communication in response to inquiries from his counsel. It was not intended to be "an acknowledgment of guilt" to agents of the government. *See* Mil.R.Evid. 304(c)(1). Any waiver of the attorney-client privilege or other protections arising out of the evidentiary hearing was limited.

The extent of such waiver should have been strictly restricted to the purposes provided by Mil.R.Evid. 705. Disclosure of the facts or data underlying an expert's opinion has a purpose under Mil.R.Evid. 705. That purpose is to allow the party achieving the disclosure to use the underlying facts or data in cross-examination to probe the validity of the opinion. *See* S. Saltzburg, *supra*, 605; S. Saltzburg & M. Martin, *Federal Rules of Evidence Manual* 118, 124 (vol. 2, 5th ed. 1990). Using an accused's statements provided to psychiatrists for consideration in forming an opinion does not make such statements admissible confessions. *Parker*, 15 M.J. at 153.

In *Parker*, the accused made statements during a compulsory mental examination ordered under paragraph 121, Manual for Courts-Martial (1969 rev). The defense subsequently provided the results of the mental examination, including the statements, to a civilian psychiatrist they had hired. At trial, the *Parker* trial counsel cross-examined the civilian psychiatrist on the statements, but never introduced them into evidence. On appeal, *Parker* maintained that trial counsel improperly used his compulsory statements to the mental examination to cross-examine the defense civilian expert.

The *Parker* court held, trial counsel had properly used the statements in the context of attacking the credibility of the civilian psychiatrist "rather than being an *obvious attempt to put the statements qua statements before the members as admis-*

sions or a confession.'' 15 M.J. at 153 (emphasis added). Further, in a footnote, the *Parker* Court specifically rejected a lower court decision holding an accused's statements to government psychiatrists, after advice of rights under Article 31, UCMJ, 10 U.S.C. § 831, admissible on the merits of the case. 15 M.J. at 152 n. 12; *United States v. Duwors,* 6 M.J. 957 (N.M.C.M.R. 1979).

Although the ''Life Story'' did not originate in the protected atmosphere of a compelled mental examination, it came about in the protected status of an attorney-client communication. It was first revealed in its entirety to the government and Doctors Coburn and Vosburg under the ''compelled'' circumstances of the evidentiary hearing. Similarly, the defense contended that revealing it to Doctors Beck and Strefling was equally compelled by the prior circumstances of the case and the military judge's ruling. I would find the reasoning of the *Parker* case rejecting admitting an accused's statements to examining psychiatrists as an ''admission'' or ''confession'' controlling under the circumstances before us in appellant's case.

Fourth, the military judge's ruling allowing the admission of prosecution 65 overlooked an important aspect of the foundation for the exhibit. To authenticate the exhibit, he took judicial notice of Mansfield's prior counsel's testimony at the evidentiary hearing. Limited use or Mil.R.Evid. 511 protection for that testimony had not been waived. Unlike the statement itself, the former attorney's testimony had no role in the defense psychiatrist' preparation for expected cross-examination or in forming any part of their opininos. Further, there was no mention of the testimony during direct or cross-examination of the psychiatrists. This testimony was still protected and it could not be used at appellant's second trial by the prosecution or the military judge for any purpose. Without this testimony, inadequate foundation existed to establish prosecution exhibit 65 as a confession or admission of appellant.

CONCLUSION

Contrary to the majority's opinion, I would find appellant was denied a fair trial by the military judge's rulings allowing the prosecution to use appellant's statement to his counsel for cross-examination and to introduce it as appellant's confession. I also would find this error to be highly prejudicial. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

First, the statement went to the court members as an admission or confession of the accused without any limiting instruction. The military judge provided no explanation of its origin or purpose.

Second, it is obvious the government relied heavily on prosecution exhibit 65 to prove the facts of the killing of Yang and as critical evidence to dispel appellant's defense of lack of mental responsibility. Trial counsel made extensive use of it during closing argument to attack the credibility of the defense expert witnesses and to undermine their opinions. The government's own experts relied on it to support their opinions and to attack the opinions of the defense experts. Trial counsel also referred to it in closing argument to show proof of the elements of the offense, to counter arguments for a lesser included offense, and to attack the possible defenses of voluntary intoxication, self-defense, and partial or full mental responsibility.

The prejudice resulting from the erroneous use and admission of appellant's narrative statement requires setting aside of his conviction and sentence.

APPENDIX D

FINDINGS OF FACT

The post-trial limited hearing ordered by the United States Air Force Court of Military Review in the case of *United States v. Staff Sergeant Clyde Edward Lyman Mansfield,* FR 048-44-1263, ACM 24758, was conducted at Lackland AFB, Texas, on 6-8 May 1986. Prior to this hearing I reviewed the record of the trial and appellate pleadings and documents. A verbatim record of the hearing was prepared, received by me on 2 July 1986, and authenticated by me on 14 July 1986. The following Findings of Fact are made.

I. Defense Pretrial Investigation of Insanity Defense

A. Investigation of Facts

1. Appearances and Roles of Defense Counsel

a. The Accused was apprehended at Edwards AFB on 5 April 1984 and placed in pretrial confinement. He was suspected of murdering Mr. Yang, Chae-Song, near Osan AB, Korea, on 4 February 1984. At his pretrial confinement hearing at Edwards AFB on 8 April 1984, he was represented by Captain Phillip T. D. Prater, the Area Defense Counsel at Edwards AFB.

b. At the pretrial confinement hearing, Captain Prater heard all the information about the offense disclosed by Special Agent Virginia Melvin, Det 4506, AFOSI, Osan AB, Korea, who had investigated the homicide. He formed an attorney-client relationship with the Accused and had the Accused at his office almost daily until the Accused was taken to Korea on or about 20 April 1984. During this time the Accused related to Captain Prater information about the offense, including the facts that he was in Korea at the time of the homicide, had met with the victim to discuss the latter's

surrender of his two children to their mother, Un-Cha Haney, and that he had had an argument and struggle with Mr. Yang who was stabbed to death with a knife. Captain Prater learned of the Accused's relationship with Un-Cha Haney, then the wife of an airman in the Accused's unit and the former wife of the victim, of the Accused's fondness for Un-Cha Haney's two children who were being kept in Korea after a visit to their father, the victim, and of Un-Cha Haney's auto accident and consequent paralysis. Captain Prater had also heard talk around Edwards AFB regarding the Accused's "obsession" with Un-Cha Haney. Captain Prater never fully briefed all this information to Lt Col R. Craig Nowak, Chief Circuit Defense Counsel, USAF Judiciary, Seventh Circuit, Yokota AB, Japan, to Major Harry P. Poole, Jr., a Circuit Defense Counsel at the Seventh Circuit, nor to Major (then Captain) Gregory P. Holder, an Area Defense Counsel at Osan AB, Korea, all of whom later became involved in the case as Defense Counsels. Early in his representation of the Accused, Captain Prater had been asked by Lt Col Nowak to write down everything he knew about the case and send it to Lt Col Nowak. Such information was never received by Lt Col Nowak and he did not again request that information.

c. Captain Prater was aware from the information disclosed at the pretrial confinement hearing that the case against the Accused consisted largely of circumstantial evidence. He felt that an issue of the Accused's sanity at the time of the offense might be present in view of the Accused's obsession with Un-Cha Haney, his desire to retrieve her children from the victim, some provocation by the victim and other circumstances, and so advised the Accused. However, Captain Prater never briefed his co-counsel on what he knew of the case and his assessments, nor did they ever request this information from him.

d. Lt Col R. Craig Nowak was the third Defense Counsel to get involved with the Accused's case. He had

detailed Major Holder, an Area Defense Counsel at Osan AB, to represent the Accused after the Accused was taken to Osan AB 20 April 1984, from Edwards AFB. He was not aware that Major Holder had only the experience of five litigated trials and no experience with homicide cases and the insanity defense. A Sanity Board was ordered on 26 April 1984 by the Commander, HQ 51 Combat Support Group, Osan AB, and the Accused was subsequently taken to Yokota AB for the Sanity Board. At this time, he first met with Lt Col Nowak who discussed a potential insanity defense with the Accused and advised him not to cooperate with the Sanity Board because the Defense Counsels didn't yet know enough about the case. During the 30 April-1 May 1984 period, the Accused did decline to participate in a psychiatric evaluation by Lt Col Robert L. Vosburg, USAF, MC, the Chief of Mental Health Services at the USAF Hospital, Yokota AB, who had been detailed as a one-man Sanity Board. During this first visit of the Accused to Yokota AB, Lt Col Nowak declined to take confidences from the Accused about his case in an effort to avoid establishing an attorney-client relationship. He did, however, advise the Accused of his right to request Individual Counsel, tell him that his detailed Circuit Defense Counsel would be either himself (Lt Col Nowak) or Major Poole, and did discuss a potential insanity defense in advising the Accused not to cooperate with the Sanity Board.

e. Lt Col Nowak eventually got more involved with the case including co-signing as "Defense Counsel" with Captain Holder a letter to the HQ 51 CSG/CC, dated 15 June 1984, requesting a Sanity Board for the Accused. He signed a letter to the Article 32 Investigating Officer, Captain Richard A. Phelps, HQ 475 ABW/JA, dated 18 July 1984, advising that the defense withdrew its request for certain witnesses at the Article 32 Investigation. He appeared with co-counsels Poole and Holder at that portion of the Article 32 Investigation conducted at Osan AB on 9-10 July 1984. He signed as

"Defense Counsel" a Pretrial Agreement Offer on 18 August 1984 (Hearing Exhibit 17).

f. Lt Col Nowak worked on the Accused's case on the several trips he made to Osan AB before the Article 32 Investigation hearing at Osan AB on 9-10 July 1984. By mid-June 1984, the Accused had shared confidences with Lt Col Nowak about the offense. Major Holder at Osan AB consulted with Lt Col Nowak on a frequent basis about the Accused's case. After the Article 32 hearing at Osan AB, Lt Col Nowak reduced his participation and regarded himself as having only a consultative role, leaving the active trial preparation to Majors Poole and Holder. However, the latter consulted with Lt Col Nowak on a very frequent basis and he signed the Accused's Pretrial Agreement Offer as "Defense Counsel" on 18 August 1984. Lt. Col Nowak contended he was not involved in the preparation of the Accused's written versions of his account of the offense (Hearing Exhibits 7 and 8), nor in the use subsequently made of them. He saw only a part of one of those statements before the Article 32 Investigation and didn't know why they were compiled. He also assisted in an effort to locate Korean witnesses in Seoul to verify some of the information related by the Accused, including conversations with a Mr. Lim about having the victim killed, the so-called "Hit Man" story. He was present at trial for all or most of the prosecution's case sitting in the spectators' section. He advised Majors Holder and Poole throughout the prosecution and then returned to Yokota AB.

g. In late May 1984, after the Accused had declined to participate in the Sanity Board at Yokata AB, Major Poole became the fourth lawyer to get involved with the Accused's case, having been detailed by Lt Col Nowak who felt the case would require more time than he had available. There was no clear division of labor among Lt Col Nowak, Major Poole and Major Holder until they decided to present the insanity de-

fense. This decision was apparently made sometime in the late summer of 1984 after the Article 32 Investigation in July and became firm upon receipt of Dr. Coburn's reports in September and October 1984 (Hearing Exhibits 10 and 11). Once a decision was made by the Defense Counsels to raise the insanity defense, it was determined that Major Poole would be responsible for and do the work associated with that part of the case. At the outset of his association with the case in late May 1984, Major Poole was aware that Lt Col Nowak and Major Holder were already working on the case and he understood from Lt Col Nowak that the three of them constituted a defense "team." He also knew that Captain Prater had represented the Accused at the Pretrial Confinement Hearing. Later on, sometime after the Article 32 Investigation, Major Poole became more active in the case, while Lt Col Nowak became less active, though the latter was regularly consulted throughout the trial preparation phase. While Major Poole regarded himself as "in charge," he looked upon Major Holder as a co-counsel and regularly consulted with Lt Col Nowak. There was no "lead counsel" firmly in charge and totally familar with and in firm command of all aspects of the case.

2. Preparation of Accused's Statement

a. Major Holder, the second Defense Counsel to get involved in the Accused's case, met the Accused on 20 April 1984, when Accused was brought to Osan AB from Edward AFB. He first obtained from the Accused an oral version of the facts and circumstances surrounding the commission of the offense. Then, over the course of the first few weeks of their relationship (approximately one month), the Accused provided Major Holder, at the latter's request, with written information about the offense which the latter typed into his computer. Initially, the Accused claimed he couldn't recall certain events including and preceding the homicide. This is the so-called "amnesia"version of the Accused's story which he told

to his first Sanity Board. Later, after confrontations with Major Holder, the Accused eventually revealed the information which Major Holder typed into a 23 page statement—the long version (Hearing Exhibit 7). The process of compiling Hearing Exhibit 7 took approximately one month and was completed on or about 19 June 1984. Major Holder stated he eventually gave a copy of Hearing Exhibit 7 to Major Poole. Major Holder felt from the outset that the Accused was not completely forthcoming about the facts, was evasive at times, and was selective in what he claimed he could not recall. This was a continuing concern of Major Holder right up to the time of trial. Lt Col Nowak perceived the Accused as frequently changing his story and stated that this hampered the preparation of the defense. TSgt Michael Noel, a Security Police Investigator temporarily assigned to the Defense Counsels, would investigate, locate and talk to witnesses, then report back his information to Major Holder. TSgt Noel observed the Accused change his story to fit the facts as they were or were not corroborated. Major Holder had allowed the Accused access to the OSI Reports of Investigation and legal resource materials while the Accused was preparing his statement. The Accused had also been present for and a part of discussions on the insanity defense. Major Holder recognized this could have resulted in the Accused's tailoring his story. In his second version of the events (Hearing Exhibit 7), the Accused included information that he had bought a knife a few hours before the homicide and had stabbed the victim with it during their confrontation over the return of the children to Un-Cha Haney. He also included information that on 2 February 1984, he and a Mr. Lim, who managed the Hunting Club in the vicinity of the Hamilton Hotel in Seoul where the Accused was staying, had together gone to an area near Osan AB to locate the house of the victim. The Accused had previously had discussions with Mr. Kong, the manager of the Hamilton Hotel, and with Mr. Lim regarding the possibility of contracting for the death of the victim and had understood that Mr.

Lim would probably ultimately agree to kill Yang with a knife for $3,000 which Lim needed to cope with financial difficulties at the Hunting Club. The Accused had also included information that on 3 February 1984, he tried to find Mr. Lim to accompany the Accused to his intended meeting with Yang to lure Yang from his house, act as an interpreter, and, if necessary, kill Yang if the meeting with Yang didn't prove fruitful. However, he had been unable to locate Lim before leaving for the encounter with Yang which concluded with Yang's death. This is the so-called "Hit Man" information. Later on, the Accused recanted some of the most inculpatory information in his statement (Hearing Exhibit 7), indicating to Major Holder that some of the information was false, some embellished and some dreamed. Major Holder then began an editing process on Hearing Exhibit 7 as he was able to verify the information in it.

b. Major Holder used the assigned Defense Investigator, TSgt Noel, to try to verify information provided by the Accused, including the Accused's discussions with Mr. Kong, the Hamilton Hotel manager, the hotel bellboy, Shim, and Mr. Lim about Lim's willingness to kill Yang. Sergeant Noel first tried without success to speak to Mr. Lim at the Hunting Club. Later, sometime before the Article 32 Investigation hearing at Osan AB on 9-10 July 1984, Major Holder and Lt Col Nowak personally went to Seoul, located Mr. Lim and various other witnesses and corroborated much of the information provided by the Accused. According to Major Holder, Mr. Lim denied having an Agreement with the Accused to kill the victim but did acknowledge knowing and having some conversations with the Accused. Still later, Lt Col Nowak again contacted Mr. Lim and verified there had indeed been conversations with the Accused regarding the killing of Yang for money. Further, Lt Col Nowak believed this information. Major Holder believed this effort by Lt Col Nowak occured well after his

preparation of the Accused's third version of the facts (Hearing Exhibit 8), possibly as late as just before or during the actual trial. Lt Col Nowak, on the other hand, was certain that his conversation with Lim verifying the "Hit Man" conversations occured prior to submission of the Pretrial Agreement Offer on 18 August 1984. Lt Col Nowak stated that either Major Holder was with him for this conversation with Mr. Lim or that he later shared this corroborative information with Major Holder. Major Holder recalled that he wasn't with Lt Col Nowak when he spoke to Lim the second time and wasn't given many details concerning this verification by Lt Col Nowak. According to Lt Col Nowak, they concluded that the information was so potentially damaging on the issue of premeditation—should it be discovered by the prosecution—that it influenced their decision to make the Pretrial Agreement Offer in August 1984 (Hearing Exhibit 17) which they both signed as Defense Counsel. Major Holder never shared this corroborative information with anyone else, though he believed that Lt Col Nowak had mentioned it to Major Poole. Major Poole insisted he was never aware of the verification of the "Hit Man" story. He had understood that Lt Col Nowak and Major Holder were unsuccessful in their efforts in Seoul to verify this portion of the Accused's story. Major Poole played no part in the proffering of the Pretrial Agreement Offer.

c. According to Major Holder, the initial denial by Lim of conversations concerning the procurement of Yang's death led to further discussions between Major Holder and the Accused about the facts and to the subsequent deletion of that information from the second typewritten version of the Accused's statement (Hearing Exhibit 8), the so-called "22 page statement." There was also a variation in the statements as to who brought the knife to the scene of the crime. In Hearing Exhibit 7, the Accused stated he had purchased the

knife shortly before meeting with Yang and stabbed him with it. In Hearing Exhibit 8, however, he stated that Yang had brought the knife, had brought the knife, had thrown it down in front of the Accused during their argument over the return of the children, and that the Accused then picked it up and Yang was stabbed during their struggle. Major Holder personally typed both Hearing Exhibits 7 and 8 on his computer, accomplishing the editing, deletions, and variations between the two statements. Both statements were typed before the Article 32 Investigation. Notwithstanding the consistency between what the Accused had originally told Major Holder and Lt Col Nowak during their first conversations with the Accused, and the extent of the verification of that information by these counsel and the investigator, the Accused represented to Major Holder that the true facts were as contained in Hearing Exhibit 8. Thus, Hearing Exhibit 8 became the operative version of the facts the Accused was instructed by his lawyers to provide during psychiatric interviews. That version provided the basis for the preparation of the Accused's defense and for his trial strategy. Major Holder indicated that the Defense Counsels had some doubt about the veracity of Hearing Exhibit 8 but that the Accused insisted it was the truthful version of the facts. He also stated that notwithstanding the verification of the "Hit Man" information they decided to stick with the version as contained in Hearing Exhibit 8 as it was "too late" to change strategies. Omission of the information relating to the possible procurement of a "Hit Man," to the purchase of a knife shortly before the homicide and to the manner of its use at the scene were crucial facts with respect to the elements of premediation and intent and could be important to the evaluations of psychiatrists as well. Major Holder himself considered Hearing Exhibit 8 as "extremely exculpatory" and a "throwaway" document. Lt Col Nowak and Major Poole were familiar with both versions of the Accused's story (Hearing Exhibits 7 and 8) but were not

involved in their preparation as Major Holder did most of the interviewing of the Accused and typed and edited the statements.

B. Defense Investigation of Insanity Defense

1. First Sanity Board

a. The Accused was apprehended at Edwards AFB on 5 April 1984. At his Pretrial Confinement Hearing there on 8 April 1984, where he was represented by Captain Prater, AFOSI Special Agent Melvin revealed that the consensus of approximately forty witnesses she had interviewed was that the Accused was "unstable." Information was also available at Edwards AFB that the Accused had been referred to the Mental Health Clinic there in early January 1984 for evaluation out of concern for his apparent obsession with Un-Cha Haney. The Accused was taken to Korea on 20 April 1984 where his pretrial confinement was continued at the Eighth Army Confinement Facility at Camp Humphreys. On 26 April 1984, a Sanity Board was directed by the Commander, HQ 51 Combat Support Group, Osan AB. The Accused was taken to the USAF Hospital at Yokota AB to meet the Board. He met with Lt Col Nowak prior to meeting the Board and was counseled against cooperating with the Board. Lt Col Nowak tendered this advice because he felt the Defense Counsels didn't then know enough about the case. On 30 April and 1 May 1984, attempts were made by Lt Col Robert L. Vosburg, USAF, MC, Chief of Mental Health Services at the USAF Hospital Yokota, and a Board Certified Psychiatrist, to interview the Accused. On the advice of Lt Col Nowak, however, the Accused declined to partcipate.

b. Then, on 14 June 1984, Lt Col Nowak and Major Holder, signed as "Defense Counsel," a letter to the Commander, HQ 51 CSG, requesting a Sanity Board for the Accused. This letter referenced the Accused's "preoccupa-

tions and obsessions," his being described as "crazy or bizarre" by numerous individuals, and his referral to the Mental Health Clinic at Edwards AFB by his unit commander in early January 1984. It requested that the Sanity Board be provided with the Charge Sheet, Accused's mental health and medical records from Edwards AFB, the audio tapes and letters seized from Accused's residence on 5 April 1984, and the AFOSI Reports of Investigation. Trial Counsel's memorandum on this letter indicated these items were provided to the Sanity Board. By letter of 15 June 1984 to the USAF Hospital Yokota (Lt Col Robert L. Vosburg), the Commander, HQ 51 CSG, directed the convening of a Sanity Board. On 21, 22 and 25 June 1984, the Accused met the Sanity Board consisting only of Lt Col Vosburg. Lt Col Vosburg's report, dated 25 June 1984 (Hearing Exhibit 23), diagnosed the Accused as having a "Mental disorder," to wit: "post traumatic neurosis, DSM III. 309.81, chronic," and concluded that the Accused had "diminished capacity to appreciate the criminality" of the offense and "lacked the capacity to conform his conduct to the law as a result of mental disorder." This Sanity Board Report was approved by Col Thomas D. Gensler, USAF, MC, the Commander of the USAF Hospital Yokota. Major Holder sat in on a three to four hour interview of the Accused by Lt Col Vosburg. His purpose was to learn what the Accused told Lt Col Vosburg, not to ensure that Lt Col Vosburg had all the known information. Major Holder recalled that the Accused told Lt Col Vosburg much of what was in Hearing Exhibit 7 but reverted to the "amnesia" version on certain critical facts, including the homicide itself. Major Holder had previously explained the insanity defense to the Accused, had observed the Accused's apparent intelligence, his reading of the Manual for Courts-Martial, MRE 302 and the discussion of MRE 302; and, had concluded that the Accused was quite intelligent and understood the insanity defense. Major Holder had discussed

with the Accused the need to be "frank," to "tell the truth," and not to "game the system." Major Holder was aware that the Accused had not provided Lt Col Vosburg with some of the information already compiled in Hearing Exhibit 7, including the *"Hit Man" conversations, the purchase of the knife,* and the facts of the actual homicide itself. Major Holder himself likewise did not provide Lt Col Vosburg with this information. Lt Col Nowak and Major Holder were "somewhat surprised" and Major Holder was "elated" with the outcome of this Sanity Board. However, Major Holder was concerned at the outset with Lt Col Vosburg's competence and feared he would not be a strong witness. Major Holder never discussed the insanity defense with Lt Col Vosburg after the Sanity Board since Major Poole was to assume the responsibility for preparation of the defense. Major Holder had no prior experience with the insanity defense.

2. Contacts with Civilian Psychiatrists

a. The Defense Counsels felt they needed additional expert evidence to bolster Lt Col Vosburg's opinion. Knowing the Accused would be returned to Edwards AFB for a portion of the Article 32 Investigation, they arranged for Captain Prater to locate civilian psychiatrists in that area. Captain Prater identified three in that locale who would be available to examine the Accused. They were a Dr. Vicary and Doctors Michael Coburn and John Beck. Captain Prater arranged appointments for the Accused with these three psychiatrists while the latter was at Edwards AFB in late July 1984 for a portion of the Article 32 Investigation. The Defense Investigator, Sergeant Noel, escorted the Accused to all three appointments and was present during the interviews of the Accused by Doctors Vicary and Coburn. Captain Prater never discussed the results of these evaluations with the examining psychiatrists themselves nor with the other Defense Counsels, nor did he actively contribute to the formulation of the defense strat-

egy. Captain Prater's involvement with the case substantially diminished after the appearance of Majors Holder and Poole in the case. He never regarded himself as an active member of the defense team after the Accused was taken to Korea following his arrest and Pretrial Confinement Hearing at Edwards AFB. Captain Prater acknowledged, however, that when the Accused returned to Edwards AFB for the Article 32 Investigation, he expressed dissatisfaction with Majors Holder and Poole and indicated he wanted Captain Prater to represent him. Captain Prater put the Accused off by explaining the advantages of having lawyers who resided close to the trial situs. He waited but never received a request for his services as Individual Defense Counsel and concedes his attorney-client relationship with the Accused was never formally terminated. Captain Prater did have some contact with Dr. Coburn over the logistics of the latter's trip to Osan AB as a witness. He recalled no specific discussions with Dr. Coburn on any substantive matters, however, including the information the Accused provided Dr. Coburn and the opinions of Dr. Coburn. At some time after these psychiatric evaluations, Captain Prater came to realize that the expert opinion of Dr. Vicary could support a defense of partial mental responsibility but never discussed it with Dr. Vicary or the other Defense Counsels. Captain Prater also acknowledged that the written evaluation of Dr. Beck (Hearing Exhibit 6) was addressed to him but he could not recall its contents and surmised he had probably just forwarded it on to Majors Poole and Holder. This opinion could have been used in support of an insanity defense. Captain Prater recalled receiving a phone call from Dr. Coburn sometime in September 1984, advising that he had changed his initial opinion and decided that he could support an insanity defense. Captain Prater acknowledged that this changed opinion from Dr. Coburn (Hearing Exhibit 11) was probably mailed to him and again surmised that he had prob-

ably forwarded it on to Majors Poole and Holder. Captain Prater did not recall discussing the contents of the changed opinion with either Dr. Coburn or with the other Defense Counsels. Captain Prater authored a *Goode* response letter offering his "lay opinion" on the Accused's diminished capacity. He still believes a defense of partial mental responsibility existed.

b. Aside from sending them the OSI Reports, the Accused's Statement (Hearing Exhibit 8), and the SFC Francis Bujakowski Affidavit (Hearing Exhibit 18) sometime in August after returning from California, Major Holder had no contact with Doctors Vicary, Beck, or Coburn since he regarded Major Poole as the defense team member responsible for the insanity defense. This was so despite the fact that he undertook the responsibility for the cross-examination of government lay witnesses on information relevant to the insanity defense. Major Holder "understood" from some preliminary information he had received after the Accused's evaluations by these three psychiatrists, however, that none of the three had opinions supportive of an insanity defense. Major Holder was unaware that the opinions of Doctors Vicary and Beck might be supportive of the defenses of partial mental responsibility and insanity, respectively. He was aware that the opinion of Dr. Beck could help the Accused on sentencing with information on the latter's personality disorder. However, no arrangements were ever made by any of the Defense Counsels for the appearances of Doctors Beck and Vicary as witnesses in any phase of the Accused's trial.

c. Lt Col Nowak had no contact with any of the three civilian psychiatrists at anytime. He also "understood" that the expert opinions of these psychiatrists would not be supportive of an insanity defense. He did become aware of the changed opinion of Dr. Coburn in September 1984.

d. Major Poole attended the Article 32 hearings, including the portion held at Edwards AFB on 23-24 July 1984. While in California he did not speak to any of the three civilian psychiatrists. He likewise "understood" from whatever he was told by someone that these psychiatrists found personality disorders in the Accused but that their expert opinions would not support an insanity defense. It was and remains his understanding that an insanity defense cannot be based upon personality disorders. He didn't then pursue the insanity defense any further in terms of locating any other civilian psychiatrists who might be supportive as the Accused had run out of funds. The insanity defense was revived or its prospects heightened in September 1984 when the Defense Counsels received Dr. Coburn's changed opinion (Hearing Exhibits 11 and 12). Major Poole was aware of Dr. Beck's evaluation (Hearing Exhibit 6) but never discussed it with Dr. Beck as he had previously understood it wouldn't support an insanity defense. Likewise, Major Poole never discussed Dr. Vicary's opinion with him though he conceded it could have supported a defense of partial mental responsibility. Neither Major Poole nor any of the other Defense Counsels ever pursued the potential defense of partial mental responsibility notwithstanding the opinions of Doctors Vosburg, Coburn, Beck, and Vicary, and notwithstanding the information the Accused had provided in Hearing Exhibit 7 as to his apparently substantial consumption of alcohol during the hours immediately preceding the homicide.

3. Second Sanity Board

a. Upon receiving the results of the first Sanity Board (Hearing Exhibit 23), the Commander, HQ 51 Combat Support Group, Osan AB, immediately directed the convening of a second Sanity Board to be conducted at the Wilford Hall Medical Center, Lackland AFB. He transmitted the first Sanity Board Report and shortly later the Affidavits relating the

Accused's episode of feigning insanity while in pretrial confinement. This information originated with fellow confinee SFC Francis Bujakowski. The Commander directed a second Sanity Board because he felt it important that the Board be aware of the Accused's efforts to feign insanity. The information in these Affidavits had not been made known to Lt Col Vosburg when he conducted his Sanity Board. By letter of 28 June 1984, Major Holder advised that the Accused would not participate in a second Sanity Board since he regarded the first such Board as "dispositive." The second Sanity Board was later directed to be held at March AFB and again the Accused declined to participate. On 2 September 1984 (prior to receiving the changed opinion of Dr. Coburn), Majors Poole and Holder signed a letter to the Trial Counsel advising that the defense of insanity would be raised at trial through the testimony of Lt Col Vosburg (Hearing Exhibit 23). During an Article 39a, UCMJ, hearing on 5 September 1984, the Military Judge granted, over objection, a prosecution motion and directed a second Sanity Board (Appellate Exhibit XIV). This Board was conducted later that month at the David Grant USAF Medical Center, Travis AFB. That Board was provided with the OSI Reports; the first Sanity Board Report (Hearing Exhibit 23); the Affidavit of SFC Francis Bujakowski (Hearing Exhibit 18) relating the Accused's efforts to feign insanity; a Statement from Sergeant Newton H. Pelkey, a Provost Sergeant at the Camp Humphreys Confinement Facility, relating the Accused's claim of amnesia prior to and during the period of the offense (Hearing Exhibit 20); a Statement from Sp5 Joseph I. Evans, a fellow prisoner at Camp Humphreys (Hearing Exhibit 19); excerpts from the Accused's medical and mental health records; and information seized from Accused's residence relating to his relationship with Un-Cha Haney. The Report of the second Sanity Board, composed of three psychiatrists, dated 25 September 1984, stated that the Accused

did not have a mental disease or defect at the time of the offense but rather a personality disorder (DSM III - Axis II - 301.89, Mixed Personality Disorder) and was signed by the Board President, Col Ali N. Baser, USAF, MC, and the other two psychiatrists.

b. Major Poole had advised the Accused on the statement he was to give the second Sanity Board. The gist of that advice was not to deviate from the information contained in the second version of his statement, Hearing Exhibit 8. He did this because the Accused persisted in maintaining that that version was the truthful version of the events. The only apparent Defense Counsel contact with this second Sanity Board was Major Poole's interview of Col. Baser, the President, upon the latter's arrival at Osan AB just before the commencement of or early in the trial. Col. Baser was brought there for possible rebuttal testimony for the prosecution. No effort was made by the Defense Counsels to have counsel in the CONUS interview the members of the second Sanity Board nor Doctors Coburn, Beck, and Vicary.

4. Lay Witness Evidence

The Report of the Military Magistrate who conducted the Pretrial Confinement Hearing on the Accused at Edwards AFB, dated 9 April 1984, included a finding that the consensus of some 40 witnesses, interviewed by AFOSI Special Agent Virginia Melvin who had investigated the case, was that the Accused was "unstable." SA Melvin also testified at the Article 32 Investigation in July 1984 that she had interviewed 37 witnesses who felt the Accused was "strange" or "crazy." By letter of 29 October 1984 to the Trial Counsel, Majors Poole and Holder stated they didn't yet know the identity of those witnesses and requested their names. The Trial Counsel's indorsement back stated she had provided SA Melvin's interview notes to Major Holder on 26 July 1984 during the Article

32 hearing. By letter of 17 January 1984 to the USAF Hospital at Edwards AFB, the Accused's Unit Commander, SMSgt Leslie J. Christie, requested "psychotherapy" for the Accused because of the latter's obsession with Un-Cha Haney. Sergeant Christie expressed concern that the Accused wasn't able to make "rational decisions" where Un-Cha Haney was concerned. (I.O. Exhibit 21) In response to this request, the Accused was seen by a Col. Juarige, USAF, MC, at the USAF Hospital at Edwards AFB and entries were made in his medical records. There is no indication that this lay witness evidence was explored, evaluated, and marshalled in any significant effort to bolster or contribute to the insanity defense.

C. Investigation of Law of Insanity Defense

The only apparent legal research done on the law relating to the defense of insanity in this case was done by Major Poole who was assigned that portion of the case. His research resources included the Diagnostic and Statistical Manual of Mental Disorders, AFR 160-42, the Military Rules of Evidence, the case of *United States v. Parker*, 15 M.J. 146 (CMA 1983), a book on malingering by Dr. Coleman, some material obtained from the Army JAG School, and an Army Pamphlet on military Justice. The latter two publications dealt with the insanity defense in a broad manner and with the questioning of expert witnesses. Major Poole did not contact anyone from the AFJAG School nor request legal research materials or professional assistance on the presentation of an insanity defense from that or any other source.

II. Accused's Role in the Insanity Defense

a. The notion of an insanity defense was first broached to the Accused by Captain Prater at sometime after the Accused's arrest on 5 April 1984 and before his return to Korea on 20 April 1984. Captain Prater did not discuss the defense in any detail, however. After the Accused was taken to Korea where

his pretrial confinement was continued at Camp Humphreys, he met with the Area Defense Counsel at Osan AB, Major Holder. On 26 April 1984, his first Sanity Board was ordered and he was taken to the USAF Hospital at Yokota AB shortly thereafter. Prior to meeting the Sanity Board the Accused met with Lt Col Nowak who advised him not to cooperate in the examination because the Defense Counsels didn't yet know enough about his case. On 30 April and 1 May 1984, the Accused did fail to cooperate and was returned to Camp Humphreys. On 14 June 1984, Lt Col Nowak and Major Holder signed a letter requesting a Sanity Board for the Accused. The Accused returned to confinement that day and told a fellow prisoner, SFC Francis Bujakowski, that his lawyers were going to request a Sanity Board, that he "had to convince the shrink that he was crazy," and that he had to "work on acting crazy." He then went into a latrine, sat on the floor, and pretended not to know where he was. A guard was called and the Accused was taken away. (Hearing Exhibit 18) Sometime in June 1984, possibly on the same day the Accused pretended not to know where he was, he was brought by a guard to SFC Newton H. Pelkey, the Provost Sergeant at Camp Humphreys. The guard had indicated that the Accused was claiming that he didn't know where he was. SFC Pelkey conversed with the Accused who claimed he last remembered leaving Edwards AFB and being stopped by a policeman for a traffic violation. The Accused claimed he didn't know where he was nor why he was confined. (Hearing Exhibit 20)

b. When the Accused was first interviewed by Lt Col Vosburg during the first Sanity Board, the Accused claimed amnesia as to the homicide and certain of the events leading up thereto. However, Doctor Vosburg did not believe that the Accused could not remember and this claimed amnesia did not influence Dr. Vosburg's diagnosis and opinions about the Accused's mental responsibility. Lt Col Vosburg had not been

provided with the information in the Bujakowski Affidavit during his evaluation of the Accused regarding the Accused's feigning of insanity.

c. Dr. Coburn was never provided with the Statements of SFC Pelkey (Hearing Exhibit 20), Sp5 Evans (Hearing Exhibit 19), and Sp4 McVery (Hearing Exhibit 21) concerning the Accused's feigning amnesia at Camp Humphreys. However, Dr. Coburn didn't believe the Accused's claimed amnesia. Dr. Coburn had been provided with the Bujakowski Affidavit (Hearing Exhibit 18) regarding the Accused's intent to feign insanity before reaching his diagnosis and opinions on the Accused's mental state. He wasn't "fooled" by the Accused into a diagnosis favorable to the Accused.

d. In his letter of 16 October 1984 to the Trial Counsel, Col James A. Boydstun, USAF, MC, AFSC/SGP, Andrews AFB, discussed the possibility of the Accused's successfully misleading his examiners by feigning mental illness. He stated that while this is possible, ". . . it becomes less difficult to substantitate malingering when a collaborator gives a sworn affidavit, as in this case, that the accused intended to mislead the doctor." Col. William H. Grant, USAF, MC, Consultant to the Surgeon General in Psychiatry and Neurology, Brooks AFB, stated in an Affidavit (Appellate Exhibit VII, pg. 25) that any evaluating psychiatrist would need to be aware of the information in the Bujakowski Affidavit since it relates to the Accused's credibility.

e. Given the information regarding the Accused's relationship and apparent obsession with Un-Cha Haney, the observations of lay witnesses, the diagnoses reached by both Sanity Boards, and both the diagnoses and opinions of Doctors Vosburg, Coburn, Beck and Vicary, I find that the potential defenses of insanity and of partial mental responsibility were not "created" defenses, notwithstanding any efforts by the Accused to feign amnesia and/or insanity.

III. Preparation of Insanity Defense

A. Lieutenant Colonel Vosburg

1. When Lt Col Vosburg examined the Accused on 21, 22, and 25 June 1984 at the USAF Hospital, Yokota AB, he had the Defense Counsel's letter of 14 June 1984 requesting the Sanity Board. This letter contained some observations about the Accused, caused to be forwarded a number of documents, and posed the salient questions regarding whether the Accused had a mental disease or defect and, if so, whether his cognitive and/or volitive capacities were affected thereby. Lt Col Vosburg took the Accused's clinical history (statement) with Major Holder present. The Accused advised Lt Col Vosburg that he might have killed Mr. Yang but that he could not really recall. Lt Col Vosburg didn't believe the Accused's amnesia. Lt Col Vosburg had several telephone conversations with Major Holder after this Sanity Board and wrote him a letter dated 13 July 1984 responding to questions Major Holder had posed. This letter stated that Lt Col Vosburg's diagnosis was "Post Traumatic Stress Disorder, DSM III, 309.81," that the Accused suffered from a "fate neurosis" and went on to relate the Accused's actions to his mental disorder. According to Lt Col Vosburg, it was not until sometime in October 1984 that Major Holder advised Lt Col Vosburg that the Accused had actually killed Yang with a knife during a confrontation over the return of Un-Cha Haney's children. When he conducted his Sanity Board, Lt Col Vosburg was advised by Major Holder that a report was needed as soon as possible. Lt Col Vosburg wanted more information about the facts and circumstances of the offense and asked Major Holder for more information but was told it all may be circumstantial despite the fact Major Holder had Hearing Exhibit 7 from the outset. From time to time, Lt Col Vosburg talked to various Judge Advocates at Yokota AB seeking information on the status of the Accused's case since he wasn't being kept ap-

prised by Defense Counsels. At some point, Major Poole came to Lt Col Vosburg's office to discuss the Accused's case and the psycho-dynamics of the Accused's commission of the offense. Lt Col Vosburg had difficulty in interpreting the words "substantial capacity" as those words related to the cognitive and volitive legs of the legal standard of insanity. By letter of 2 September 1984, Subject: Answer to Request for Discovery, Majors Holder and Poole advised the Trial Counsel that the insanity defense would be relied on at trial and indicated that the defense expert witness would be Lt Col Vosburg. This notice was given prior to the Defense Counsels being advised that Dr. Coburn had changed his opinion and would also be available to support an insanity defense.

2. In November, 1984, when he arrived at Osan AB to give testimony at the trial, Lt Col Vosburg did not meet with the Defense Counsels on the day of his arrival. In fact, he was interviewed first by the Trial Counsel. He did meet with Defense Counsels the next day and spent hours talking with them. Much of the discussion centered on the discovery in Dr. Coburn's notes that the Accused had made some reference to the obtaining of a "Hit Man" during his interview with Dr. Coburn. Lt Col Vosburg could not recall ever having heard any references to a "Hit Man" prior to these conversations with Defense Counsels and Dr. Coburn. Lt Col Vosburg regarded the information about the Accused's having had discussions about the possibility of obtaining a "Hit Man" as simply "a detail" which would have to be accounted for but which would not seriously affect his opinions and testimony. Lt Col Vosburg discussed the Accused with Dr. Coburn and felt that he and Dr. Coburn were in basic agreement regarding their respective diagnoses and expert opinions on the insanity defense. Lt Col Vosburg was nervous about the prospect of testifying as ;he was not a forensic psychiatrist, had difficulty interpreting "substantial capacity," and was concerned about his cross-examination and being confronted in rebuttal with

Col. Boydstun's disagreement with his diagnosis and opinions. He wanted to be a credible witness but sensed that Defense Counsels viewed him as a "weak witness." He was ultimately advised that he would not be called as a witness since the insanity defense was not going to be put on by the Defense Counsels consequent to their discovery of the Accused's "Hit Man" revelation in Dr. Coburn's notes.

B. Doctor Coburn

1. Dr. Coburn first saw the Accused in his office on 25 July 1984. In addition to the information he obtained from the Accused, he had available the OSI Reports, the Accused's typewritten statement (Hearing Exhibit 8), RCM 706, the Bujakowski Affidavit (Hearing Exhibit 18), Lt Col Vosburg's Sanity Board Report (Hearing Exhibit 23), and the psychological report of J. R. Mack, Ph.D. His initial and tentative conclusions were that the Accused was not open and honest with him and that he could not be supportive of an insanity defense. His notes revealed that the Accused had, during this July interview, mentioned information about his consideration of obtaining a "Hit Man." (Hearing Exhibit 10) TSgt Noel, who sat in on this interview, contends he told Major Holder after theinterview that the Accused had revealed the "Hit Man" information to Dr. Coburn and that Major Holder was obviously upset to hear of it. Major Holder denies this. Sometime after receiving Hearing Exhibit 8 and other materials from Major Holder in early August, Dr. Coburn changed his opinions with regard to the Accused's diagnoses and capacities at the time of the offense after reading and reflecting on the documents. He determined, apparently sometime in early September 1984, that the Accused did indeed have a mental disorder which did affect his cognitive and volitive capacities at the time of the offense. (Hearing Exhibits 11 and 12) He addressed his changed opinion to Captain Prater, along with his memo of September 11, 1984. (Hearing Exhibit 13) In that

opinion (Hearing Exhibit 11), Dr. Coburn stated that the Accused at the time of the offense was "substantially lacking the capacity to have conformed his conduct to the requirements of law and further substantially diminishing (sic) his capacity to have appreciated the criminality of his conduct. . . ." Dr. Coburn noted that he was a forensic psychiatrist who had examined approximately 800 criminal homicide defendants among thousands of other defendants. In his Supplemental Report of October 11, 1984 (Hearing Exhibit 12), addressed to Captain Holder, Dr. Coburn related his diagnoses of the Accused to the description in the Daignostic and Statistical Manual of Mental Disorders, 3rd Edition (DSM III). He opined that the Accused's general mental condition, prior to going to Korea, while in Korea, and subsequent to the offense, fit the criteria for Post-Traumatic Stress Disorder, Adjustment Disorder of Adult Life, and Character Disorder of the Mixed Type, and, that while in Korea at the time of the offense, the Accused very probably suffered from a Massive Depressive Episode.

2. Dr. Coburn next saw the Accused after he arrived at Osan AB on 21 November 1984, after the prosecution had rested its case in chief, to give testimony at the trial. It was at Osan AB where he met the Defense Counsels for the first time and was first provided with the insanity standards definitions from AFR 160-42 and the letter of Col. James A. Boydstun, USAF, MC, HQ AFSC/SGP, dated 5 November 1984, which was critical of his two reports (Hearing Exhibits 11 and 12). The report of the second Sanity Board had been sent to Dr. Coburn before he arrived at Osan AB but its contents had not been discussed with him by the Defense Counsels. He had spoken with both Majors Poole and Holder on the telephone a few times before traveling to Osan AB, primarily on logistical matters. These several phone calls totaled approximately 30 minutes. Dr. Coburn did not feel he had been adequately

prepared by the Defense Counsels as an expert witness, based on his extensive experience as a forensic psychiatrist. He had not been provided with the deposition of Un-Cha Haney, the legal principles involved in the defense of partial mental responsibilty, information concerning the Accused's referral to the Mental Health Clinic at Edwards AFB in early January 1984 by his unit commander and the subsequent examination there by Col. Jaurige, the psychological tests used by the second Sanity Board, the information from the lay witnesses interviewed by OSI SA Virginia Melvin, the additional information about the Accused's attempts to feign amnesia and/or insanity contained in Hearing Exhibits 19, 20, and 21, nor were his notes requested for review prior to his arrival at Osan AQB. Also, he never reviewed the Article 32 Investigation.

3. Dr. Coburn's notes were never reviewed by the Defense Counsels prior to his arrival at Osan AB at the conclusion of the prosecution's case in chief and Dr. Coburn had never been provided with a copy of Hearing Exhibit 7, the earlier version of the Accused's story. There was considerable consternation among the Defense Counsels upon their discovery in Dr. Coburn's interview notes that the Accused had mentioned his conversations about the possible procurement of a "Hit Man" to get revenge on Mr. Yang for not releasing Un-Cha Haney's children. Dr. Coburn himself was surprised by this information as he had not reviewed his own notes before traveling to Korea. He had not taken into account this "Hit Man" information in writing his reports (Hearing Exhibits 11 and 12) and would have been "surprised" had he been confronted with this information during his cross-examination. According to Dr. Coburn, the Defense Counsels did not work with him at Osan AB in an effort to let him think through this information and how it might be accommodated within his expert opinions. He is presently not sure whether at that time he was of the view that his expert opinions were largely

unaffected by the revelation of the "Hit Man" information. However, his diagnoses of the Accused's mental condition didn't change. His opinion on the cognitive leg of the sanity standard, already the least supportive of the Accused, was probably further weakened with this information. The Defense Counsels made the decision not to present the insanity defense because of their concern over the revelation to the jury of the "Hit Man" information in Dr. Coburn's notes and its affect on the premeditation element. They then worked with Dr. Coburn to put together a document for use in the sentencing phase of the case. (Defense Exhibit U) Dr. Coburn is presently of the view, however, that this information about a "Hit Man" does not change his opinions regarding the Accused's lack of mental responsibility and can be accommodated in his explanation of the psychodynamics of the events leading up to the homicide.

C. Doctors Beck and Vicary

John Beck, M.D., a Diplomate in Psychiatry, forwarded his Psychiatric Examination of the Accused to Captain Prater by letter of August 17, 1984. In that letter (Hearing Exhibit 6), Dr. Beck indicated that he was prepared to elaborate on his opinions on the volitive leg of the legal standard on mental responsibility, that he viewed this as the key issue and important also on sentencing if that phase of the case were reached. He stated he was ready to respond further upon request. Apparently no such request was ever made by the Defense Counsels. In his report (Hearing Exhibit 6), he indicated he had interviewed the Accused on two separate occasions, and had read the OSI Reports, the Bujakowski Affidavit, the Report of the first Sanity Board, and certain psychological tests. He also stated there could be value in his interviewing certain key people people involved in the Accused's life. Dr. Beck's diagnostic impression was "DSM III, Axis II, 301.80: Mixed Personality Disorder in an individual with average

intelligence." His opinion went on to state with particularity a number of disturbed personality features he had found in the Accused. In his opinion, the Accused had a "mental defect," "did not lack substantial capacity to appreciate the criminality of the alleged crime," but "as a result of such mental defect did lack substantial capacity to conform (his) conduct to the requirements of the law." Major Poole partially agrees that Dr. Beck could have supported an insanity defense and could not recall where he got the information, revealed in his notes, that Dr. Beck couldn't support that defense. In any event, no effort whatsoever was made by the Defense Counsels to use Dr. Beck's diagnosis and opinions. Major Poole conceded that Dr. Vicary's opinions could have supported the defense of partial mental responsibility, though not the insanity defense. He didn't pursue the defense of partial mental responsibility with any of the psychiatrists.

D. Lay Witness Evidence.

Neither the record of trial nor the evidence taken in the post-trial hearing indicates that Defense Counsels prepared any lay witness evidence to support the insanity defense. As has been previously noted above, numerous persons interviewed by the AFOSI Special Agent investigating the case were of the opinion that the Accused was "crazy," "bizarre," "unstable" and so on. Also, the Accused's unit commander requested "psychotherapy" for the Accused from the hospital at Edwards AFB shortly before the Accused left on his fateful trip to Korea and the Accused was seen at the Mental Health Clinic and Edwards AFB by Col. Jaurige.

IV. Abandonment of Insanity Defense

Upon discovery of the "Hit Man" information in Dr. Coburn's notes after he arrived at Osan AB to testify on the insanity defense, Majors Poole and Holder decided to forego that defense. Their decision was based on their belief that

revelation of this information to the court members would have a devastating impact and create a very substantial risk of the Accused's conviction of premeditated murder. They also perceived the strength of Dr. Coburn's testimony to have dominishedin that he wasn't then prepared to deal with that "Hit Man" information. Counsel were aware from the outset of the case that if they presented the testimony of an expert psychiatric witness, they could be compelled to produce the Accused's statement (Hearing Exhibit 8) for use by the prosecution in preparing for cross-examination of the witness. It is less certain, however, that the Defense Counsels were similarly aware that they would have to release the notes of a psychiatrist as well if they put such witness on the stand. Though unable to recall specific occasions, Lt Col Nowak believed that the releasability of the Accused's statements to psychiatrists was discussed with him. Major Holder recalled discussing MRE 302 with the Accused. Major Poole couldn't recall any specific discussions of this matter with the Accused and couldn't recall it was ever a concern. Defense Counsels never were concerned about the release of Hearing Exhibit 8 though they strenuously resisted its release until ordered by the Military Judge so as to give the prosecution the least possible time with the document. Similarly, the allegation in the *Goode* response that this ruling was erroneous and caused the collapse of the insanity defense was merely a *pro forma* assertion of error without any belief whatsoever in its validity. Majors Poole and Holder knew all along they would have to release Hearing Exhibit 8 and the psychiatrists notes to the prosecution if they put on psychiatric evidence. They simply never anticipated have to deal with the "Hit Man" information at trial in any fashion. Major Poole was not aware that anyone other than the Accused and the defense team were aware of that information. However, according to TSgt Noel, he told Major Holder that the Accused had revealed that information to Dr. Coburn during the interview. Major Holder denies this.

They had proceeded all along with a two-pronged strategy of defense: First, the inability of the prosecution to prove beyond a reasonable doubt that the Accused killed Yang in that the available evidence was circumstantial; and, second, demonstration of the Accused's lack of mental responsibility for the offense. In their estimation, proceeding with the insanity defense at that juncture would have seriously risked findings of both premeditation and mental responsibility. Lt Col Nowak, though questioning the "appropriateness" of the decision to forego the insanity defense, decided not to override it. Captain Prater, when consulted on the decision by telephone, thought it a "dangerous" course of action. According to the presiding Military Judge, the court members were noticeably bewildered when advised they would hear no sanity defense evidence. They had, after all, been primed to hear such by opening statements, *voir dire*, preliminary instructions, and certain cross-examination by the defense.

/s/ Philip F. O'Neill
PHILIP F. O'NEILL, Colonel, USAF — 1 August 1986
Chief Circuit Military Judge

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SUPREME COURT, U.S.
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No. 93-1030

In the Supreme Court of the United States

OCTOBER TERM, 1993

CLYDE E. L. MANSFIELD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner waived his attorney-client privilege by introducing expert testimony that relied on and referred to a personal statement prepared by petitioner for purposes of planning his defense.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-9a) is reported at 38 M.J. 415 (1993). The initial opinion of the Air Force Court of Military Review (Pet. App. 11a-25a) is reported at 24 M.J. 611 (1987). The opinion of the Air Force Court of Military Review (Pet. App. 25a-94a) on rehearing is reported at 33 M.J. 972 (1991).

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 30, 1993. The petition for a writ of certiorari was filed on December 28, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1992).

STATEMENT

Following a general court martial, petitioner was convicted of premeditated murder, in violation of Article 118(1) of the Uniform Code of Military Justice, 10 U.S.C. 918(1). He was sentenced to life in prison, a dishonorable discharge, total forfeiture of all pay and allowances, and a reduction in grade. The Air Force Court of Military Review vacated petitioner's conviction on the ground that he had been denied effective assistance of counsel. Petitioner was convicted on retrial and sentenced to life in prison, a dishonorable discharge, total forfeiture of all pay and allowances, and a reduction in grade. The Air Force Court of Military Review and the Court of Military Appeals affirmed.

1. On February 4, 1984, Yang Chae-Song was found stabbed to death near Osan Air Base in Korea. Petitioner, a service member stationed at Hawes Air Force Station in California, had been romantically involved with Yang's former wife, Un-Cha. Yang had custody of Un-Cha's and his children. Petitioner went to Korea to convince Yang to allow the children to come to the United States. After arranging a meeting with Yang on false pretenses, petitioner fatally stabbed Yang. Pet. App. 25a-31a.

In April 1984, petitioner was arrested in California. Petitioner underwent a psychiatric evaluation before a sanity board, after which his attorneys decided to try to develop an insanity defense. Defense counsel arranged for several different psychiatrists to interview petitioner. In the course of trial preparation, petitioner's attorneys asked petitioner to recount events leading up to Yang's death. In the first version of petitioner's written statement, he indicated that he had hired a "hit man" to kill Yang, and he described the purchase of the murder

weapon and the way he had used it. Although a version omitting some of the information was prepared for the psychiatrists, two of the psychiatrists, Drs. Vosburg and Coburn, learned of the "hit man" aspect of petitioner's story. After defense counsel discovered that Dr. Coburn had referred to a "hit man" in his notes, petitioner's attorneys decided to abandon the insanity defense, because they feared that disclosure of those references could undermine petitioner's chance of acquittal.[1] Pet. App. 13a-18a.

2. Petitioner appealed his conviction on the ground that his attorneys had rendered ineffective assistance of counsel by not presenting an insanity defense. The Air Force Court of Military Review ordered an evidentiary hearing on that claim. During the hearing, the military judge ordered petitioner's counsel to produce both versions of the personal statement prepared in connection with his trial. Based on the military judge's findings, the Court of Military Review vacated petitioner's conviction. Pet. App. 4a-5a, 19a-24a.

3. At the second court martial, petitioner introduced the testimony of expert witnesses in support of the defenses of lack of mental responsibility and reduced mental responsibility. Pet. App. 5a-6a, 32a-34a. The defense used petitioner's long personal statement that he had written in preparation for his first trial during its examination of petitioner's expert witnesses. All of the expert witnesses except Dr. Vosburg had relied on that statement in arriving at a diagnosis. Over petitioner's objection, the government introduced petitioner's statement into evidence and cross-examined petitioner's ex-

[1] Petitioner's counsel also decided that Dr. Vosburg, who was not a forensic psychiatrist, would be a weak witness. Pet. App. 17a.

pert witnesses based on the statement. *Id.* at 7a n.4, 8a, 35a.

On appeal, petitioner argued that the prosecution should have been barred from relying on any evidence derived from the ineffective-assistance-of-counsel hearing. A divided panel of the Air Force Court of Military Review held that petitioner had waived any attorney-client privilege with respect to matters relating to his ineffective-assistance-of-counsel claim. The court also found that because petitioner's attorneys had based a large portion of their direct examination of petitioner's experts on the information found in petitioner's personal statement, the members of the court martial were entitled to consider the entire statement. Pet. App. 39a-44a.

4. The Court of Military Appeals affirmed. Pet. App. 1a-9a. The court rejected petitioner's claim that his incriminating statement was improperly introduced into evidence. The court noted that, in presenting his mental responsibility defenses at the second trial, petitioner "call[ed] expert witnesses, armed with his incriminating statement, to testify about his mental condition at the time of the killing." *Id.* at 6a.[2] The court held that when an expert witness testifies using a privileged statement as the basis for formulating his opinion, the attorney-client privilege "terminates with respect to those matters placed in issue by the expert's testimony." *Id.* at 7a-8a. The court reserved the question whether petitioner's statement would have remained privileged if he had introduced it solely to support his earlier claim that he had been denied the effective assistance of counsel in

[2] The court accepted the finding of the Court of Military Review that it was "clear that defense experts used [petitioner's] statement in reaching a diagnosis." Pet. App. 7a n.4.

his first trial, but had not affirmatively used it to support his mental responsibility defense on retrial. *Id.* at 7a n.4.

ARGUMENT

Petitioner argues (Pet. 10-22) that his personal statement prepared for his attorneys in connection with his first trial was not admissible at his second trial because it was protected by the attorney-client privilege.[3] The Court of Military Appeals correctly held, however, that petitioner waived his attorney-client privilege on retrial by providing his expert witnesses with the statement and by using it in eliciting their testimony.

Each defense expert at petitioner's second trial adverted to the statement during direct examination, and the courts below found that petitioner's experts relied on the statment in reaching a diagnosis. Pet. App. 6a-7a nn. 2 & 4. As the Court of Military Review explained, "when such experts are called as a witness on behalf of the accused and the witness has relied upon statements of the accused in formulating an opinion, the attorney-client privilege terminates with respect to those matters placed in issue by the expert's testimony." *Id.* at 7a-8a (footnote omitted). That conclusion is consistent with this Court's recognition that a defendant waives his evidentiary privilege with respect to matters covered in and reasonably related to material he introduces. See *United States* v. *Nobles*, 422 U.S. 225, 239-240 (1975); see also *id.* at 239 n.14 (when counsel "attempts to make a testimonial use" of matters otherwise covered by work-product privilege, "normal rules of evidence come into play with respect to cross-examination and production of

[3] Statements provided to defense experts in preparation for trial are presumptively within the protection of the attorney-client privilege. *United States* v. *Tharpe*, 38 M.J. 8, 15 n.5 (C.M.A. 1993).

documents"). By eliciting the testimony of defense experts based on and referring to his personal statement, petitioner waived any claim to prevent the factfinder from considering the entire statement. See, *e.g.*, *United States* v. *Frederick*, 3 M.J. 230, 234 (C.M.A. 1977); *Wallace* v. *United States*, 360 F.2d 939, 939 (5th Cir.) (per curiam), cert. denied, 385 U.S. 977 (1966).[4]

Petitioner argues (Pet. 14-16) that he was in fact impermissibly penalized for asserting a claim of ineffective assistance of counsel in connection with his first trial. Relying on *Simmons* v. *United States*, 390 U.S. 377, 394 (1968), which holds that a defendant's testimony at his Fourth Amendment supression hearing may not be used against him at trial, petitioner contends that the introduction of his personal statement at the hearing on his ineffective-assistance-of-counsel claim should not have resulted in a waiver of his attorney-client privilege with respect to material in that statement. This case, however, presents no occasion to decide that question. The Court of Military Appeals held that petitioner waived his attorney-client privilege with respect to the statement not by presenting it at the ineffectiveness hearing, but by introducing expert testimony relying on his personal statement at the second trial. Pet. App. 6a-7a. The court thus expressly reserved the question whether petitioner's attack on his attorneys' competence in the first trial waived his attorney-client privilege as

[4] Once the privilege was waived, the personal statement was admissible. An expert who offers a testimonial opinion can be required "to disclose the underlying facts or data on cross-examination." Mil. R. Evid. 705. In addition, the personal statement was admissible as the admission of a party opponent. Mil. R. Evid. 801(d)(2).

to those matters introduced in connection with his ineffective-assistance-of-counsel claim. *Id.* at 7a n.4.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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